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# ONTARIO LABOUR RELATIONS BOARD REPORTS



**April 1993**



Ontario

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1993] OLRB REP. APRIL**

**EDITOR: RON LEBI**

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

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Unfair Labour Practice - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Union making complaint in October 1992 alleging that employees unlawfully discharged for union activity - Hearing in discharge complaint commencing in December 1992 and continuing on dates in February, April and May 1993 - Union filing application in February 1993 seeking interim reinstatement of employees pending final determination of complaint - Assuming truth of allegations, complaint making out arguable case for remedies sought - Board weighing relative labour relations harm resulting from granting or not granting interim order sought and declining to order interim relief - Delay militating against granting interim relief - Board not persuaded that interim order power ought to be used to limit or avoid harm which is purely financial - Application dismissed

MORRISON MEAT PACKERS LTD.; RE U.A.W. ....

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Unfair Labour Practice - Duty to Bargain in Good Faith - Union alleging that Board of Education breached duty to bargain when its elected trustees failed to approve proposed settlement

put before them by their negotiators with recommendation for ratification - Board concluding that circumstances faced by Board of Education when asked to ratify had shifted sufficiently and generated sufficient economic uncertainty to warrant reconsideration of Board of Education's earlier collective bargaining stance - Change in circumstances following tentative settlement found to be real and compelling - Board of Education's decision not pretence or subterfuge - Complaint dismissed

BOARD OF EDUCATION FOR THE CITY OF HAMILTON, THE; RE LOCAL 527,  
O.P.E.I.U. ....

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Witness - Certification - Charges - Evidence - Intimidation and Coercion - Petition - Practice and Procedure - Board reviewing principles governing restricted scope of reply evidence and declining to permit employer to split its case by calling one witness to events in dispute during its case in chief, and the other witness during reply - Board concluding that timely petition not a voluntary expression of employee wishes - Board finding no intimidation or other improper conduct by union casting doubt on union's membership evidence - Certificate issuing

TATE ANDALE CANADA INC.; RE UNITED STEELWORKERS OF AMERICA .....

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**2424-92-R Hotel Employees Restaurant Employees Union, Local 75, Applicant v. Accomodex Franchise Management Inc., Kelloryn Hotel Inc., Responding Parties v. United Food & Commercial Workers, Local 206, Intervenor**

**Sale of a Business** - Fourteen months following closure of hotel, responding party purchasing lands, buildings and virtually all tangible assets formally used by predecessor employer in hotel operation - Responding party claiming that it purchased collection of idle assets, not “business” or “part of a business” within meaning of the *Act* - Purchaser using core assets to supply same general services to same general market, including some of the same customers - Substantially same jobs being performed in substantially same place in respect of substantially same services for similar market - Hiatus not conclusive where asset configuration substantially intact and continuing at core of “new” business organization - Board finding “sale of a business”

**BEFORE:** R. O. MacDowell, Alternate Chair, and Board Members R. W. Pirrie and C. McDonald.

**APPEARANCES:** Pamela Chapman, Ilana Lewis, Stan Urbain and Dave Price for the applicant; David L. Brisbin and Stephen Phillips for Accomodex Franchise; E. Coetzee for the intervenor.

**DECISION OF THE BOARD;** April 20, 1993

**I**

1. This is an application under section 64 of the *Labour Relations Act*. Hotel Employees, Restaurant Employees Union, Local 75 (“Local 75”) claims that the “business” or “part of the business” of the Skyline Triumph Hotel, at Keele Street and 401 in North York, has been transferred to Kelloryn Hotel Inc. and/or Accomodex Franchise Management Inc. (“Accomodex”) which now runs the operation as a “Howard Johnson” Hotel. Local 75 claims that, as a result of this transfer, it retains bargaining rights for the employees working at the hotel, and the successor(s) [see *infra*, paragraph 8] must apply the collective agreement which Local 75 had with the Skyline Triumph.

2. Accomodex replies that there has been no transfer of a “business” or “part of a business” within the meaning of section 64 of the *Act*. All that has been transferred is a collection of idle assets. This position is supported by the United Food & Commercial Workers, Local 206 (“UFCW”) which purports to represent the employees now working at the hotel.

3. There was no reply from Kelloryn Hotel Inc., nor did “Kelloryn” appear or take an independent role in this proceeding (i.e. independent of Accomodex). There was no reply from the Skyline Triumph organization either.

4. The provisions of section 64 of the *Act* in effect at the time of the transfer read as follows:

**64.** (1) In this section,

“business” includes a part or parts thereof;

“sells” includes leases, transfers and any other manner of disposition and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade

union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 54, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 54, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represent the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Despite subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);

- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of sections 5, 58, 60, 62 and 125, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 7.

(11) Where one or more municipalities as defined in the *Municipal Affairs Act* is erected into another municipality, the two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and

- (a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;
- (b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of two of the person's businesses; and
- (c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the the case of the intermingling of employees in two or more businesses under this section.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

## II

5. This application was filed on November 12, 1992. A hearing in the matter was held, in

Toronto, on February 15, 1993. On February 16, 1993, the Board issued a brief “bottom line” decision, with reasons to follow, declaring that there had been a transfer of a “business” within the meaning of section 64.

6. At the hearing on February 15, 1993, the UFCW appeared and asserted an interest in the outcome of this proceeding. The UFCW had not filed a formal intervention prior to the hearing; however, the UFCW asserted that it was interested in the outcome of the case because of a collective agreement with Kelloryn Hotel Inc. that was executed on November 20, 1992 (i.e. a few days after this application was filed). That collective agreement makes the UFCW the bargaining agent for the employees at the hotel which is the subject matter of this proceeding, and requires those employees to become members of the UFCW.

7. The UFCW has not been certified to represent the employees at the hotel, and it is not clear whether, at the time the UFCW entered into the above-mentioned collective agreement, there were any employees actively at work at the hotel (which did not open until December 1, 1992). There is no evidence that any of the employees purportedly bound by this agreement were members of the union at the time it was signed. Nevertheless, Local 75 did not object to the Board receiving submissions from the UFCW, provided that this did not prolong a proceeding in which counsel had already reached substantial agreement on the facts. And, as it turned out, the UFCW did not take an active role, called no evidence, and merely made submissions on the conclusion which the Board should draw from the evidence agreed upon or led by the other parties.

8. We should also note that, by agreement, the parties have narrowed the issue before us to one simple question: does the transaction by which the “Triumph” Hotel passed from its previous owners to Kelloryn and/or Accomodex, constitute a transfer of a “business” or “part of a business” within the meaning of section 64 of the *Labour Relations Act*. The Board was not required, nor asked, to determine the precise identity of “the successor employer” now operating the “Howard Johnson” Hotel at Keele and 401 (i.e. Accomodex, Kelloryn, or perhaps both - see section 1(4) of the Act). Nor were we asked to consider any of the remedial provisions of section 64, or the consequences of a conclusion that section 64 was applicable (such as the impact of the Local 75 agreement). Counsel for Accomodex advised the Board that if the transaction we are asked to consider is one to which the statute applied, it was acknowledged that Local 75 would represent the hotel’s employees, and the parties could then work out among themselves what that would mean in practice. Counsel for Accomodex indicated that he was confident the parties would be able to do so. Accordingly, it was unnecessary for the Board to determine whether Accomodex or Kelloryn, or both, were the “employer” for the purposes of the *Labour Relations Act*.

9. The Board proceeded on that basis, and the facts were not substantially in dispute. The evidence consisted of an agreed statement of facts, supplemented by the *viva voce* testimony of Stephen Phillips, the President of Accomodex, and Stan Urbain, the Secretary and Business Manager of Local 75.

10. Credibility is not an issue. The question is one of characterization: did the “Howard Johnson” Hotel business at Keele and 401 acquire all, or a legally significant “part”, of the “business” of the Skyline Triumph, within the meaning of section 64 of the Act. If it did, Local 75’s bargaining rights are preserved in that “business” or “part of a business”, regardless of the precise relationship between Accomodex and Kelloryn.

### III

11. In 1981, Local 75 was certified to represent the employees working at the “Triumph” Hotel located at 2737 Keele Street, North York, near Highway 401. Until 1988 the hotel was

known as the Triumph *Sheraton* Hotel. Thereafter, it was known as the *Skyline* Triumph Hotel. We do not know the reason for this change in name or whether (as seems likely) it signifies a change of ownership or commercial affiliation. In 1991, the owners of the hotel were the Skyline Triumph Hotel Limited Partnership and Triumph Hotel Holdings Ltd.

12. The Triumph Hotel was substantially renovated in 1989, adding a new tower with 176 rooms. In 1989-90 the Triumph also renovated its meeting rooms. We do not know the cost of these renovations or the value of the renovations in relation to the value of the existing premises; however, the tower almost doubled the Triumph's room capacity, and much of the existing facility is relatively new.

13. As of July 1, 1991, there were 216 employees working in the hotel. Those employees were represented for collective bargaining purposes by Local 75. They occupied such job classifications as: maids, bellpersons, waiters, waitresses, buspersons, bartenders, porters, cashiers, dishwashers, housekeepers, etc.

14. The employees worked in the rooms, restaurants and service facilities associated with the hotel complex. Their terms and conditions of employment were prescribed in a collective agreement with Local 75 which was executed on July 25, 1990. That collective agreement runs from October 1, 1990 to September 30, 1993, and from year to year thereafter unless terminated by notice.

15. On July 19, 1991, the Triumph Hotel closed, without advance notice to its employees, its patrons, or those with whom it did business. We do not know the precise reason for that closure, but the appointment of Price Waterhouse as the receiver of the "property, assets and undertaking" suggests that the Triumph was another casualty of the recession. Presumably, the owners encountered financial difficulties or there was insufficient business to support the hotel's recently expanded operation. It is common ground that the sudden closure was distressing for all concerned.

16. During the period between July 19, 1991 and December 1, 1992, the Triumph Hotel was controlled by a receiver, Price Waterhouse and/or a trustee in bankruptcy, Richter and Partners Inc. Throughout this period, Local 75 had ongoing contact with these parties concerning the payment of outstanding union dues, salary, termination and severance pay respecting the employees in the bargaining unit. As late as November 4, 1992, a representative of Local 75 was admitted to the Triumph Hotel by the receiver and a person now employed by the "Howard Johnson Plaza Hotel North York" (Mr. Oliver Gomes), to review payroll, pension/health and welfare, and dues records which remained in the building. Local 75 has never abandoned its bargaining rights or its interest in continuing to represent the workers employed in the hotel.

17. On or about September 9, 1992 the Triumph was sold to an entity named Kelloryn Consulting Inc., pursuant to an agreement of purchase and sale dated July 27, 1992. The parties before us did not distinguish between Kelloryn Consulting Inc. and Kelloryn Hotels Inc. (the name on the UFCW collective agreement). For present purposes, we will therefore continue to refer to the owner of the hotel simply as Kelloryn.

18. As a result of the agreement of purchase and sale, Kelloryn acquired the lands, buildings, and virtually all of the tangible assets formerly used by the Triumph in its hotel operation. These assets are described in the agreement of purchase and sale this way:

- (a) the lands situate at 2737 Keele Street, in the City of North York, as more particularly described in Schedule "B-1" and shown outlined in red on the plan annexed hereto as

Schedule "B-2" (the "Lands") and all of the right, title and interest of the Debtors, in and to the following:

- (b) the buildings, structures (including the parking facilities) and improvements (save and except any trademark or tradename attached thereto) on the Lands together with all fixtures (including light fixtures and plumbing fixtures), attachments, machinery, equipment, furnaces and systems located in or on the buildings, structures and improvements of the Lands including the lighting, heating, air conditioning, plumbing, electrical, ventilating, boilers, compressors, sprinklers, maintenance equipment, transformers, master T.V. antenna, television aerials and wiring with individual leads to rooms, lobbies, offices, facilities and otherwise, fittings, hot water heaters and other improvements erected in or upon the Lands (the "Buildings") and all of the right, title and interest of the Debtors; and
- (c) all of the furniture, appliance (electrical or otherwise) equipment and other tangible personal property, including but not limited to refrigerators, stoves, window blinds, curtains, screen windows, doors and the items located in or on the Lands or Buildings (the "Chattels") save and except leased equipment (which will be dealt with as provided in paragraph 18 of the Agreement), Inventory and receivables of the Debtor and Excluded Chattels as outlined in Schedule "E" hereto, and all of the right, title and interest of the Debtors.

19. It was originally anticipated that some 380 Magnavox colour television sets and stands would be excluded from the transaction, but ultimately, these were acquired by Kelloryn as well. Kelloryn did not acquire certain inventory (which apparently had been seized by creditors) or various other chattels including: some paging and communications devices, a fax modem, 3 American Express card identification machines, a Coca-Cola display refrigerator, 2 cigarette machines, coffee-making equipment, a City of Toronto recycling bin, and a popcorn maker.

20. In summary, then, Kelloryn acquired the land, building and all of its contents, which included fixtures, furniture, kitchen and dining room equipment, laundry equipment, telephone equipment, linens and other laundry and housekeeping supplies, except the chattels mentioned above. Much of this material can now be found in the new operation - although there has been an ongoing effort to refurbish the premises and upgrade its amenities. There have been modifications to the security, fire and sprinkler systems, as well as changes to the decor of the bars and restaurants and the major meeting rooms.

21. Mr. Phillips, the President of Accomodex, testified that there have also been "operating changes" to the hotel (room amenities, housekeeping program, linens, etc.), although he noted that, from a physical standpoint, there was no addition of furniture, vinyl, or pictures to the rooms, and the TV sets remained about the same. There was a change in the exterior of the hotel, some replacement of windows, and cosmetic changes to the bars and restaurants. Some of the furniture was recovered, there was new paint and wallpaper, plants were added to the restaurant area, and menus were revised. Some of the kitchen equipment was refurbished and the kitchen area itself was re-tiled. The existing pool and sauna were upgraded with the addition of gym equipment and a "Health Club".

22. Because of the way the building is constructed, the general lay-out remains the same. The lobby, ballrooms, restaurants, and meeting rooms remain much as they were before. Their appearance has been improved and the names have changed. The external signage has also been changed to reflect the fact that the hotel is now operated as the Howard Johnson Plaza North York. The hotel opened under that name on December 1, 1992.

23. The hotel advertising brochures clearly identify it as the "Howard Johnson North York" located at Keele and 401. That advertising material notes prominently that the hotel is:

“Ten minutes from the North York business district, Pearson International Airport. Close to Canada’s Wonderland, Kingswood Theatre, Black Creek Pioneer Village, York University and Yorkdale Shopping Centre, fifteen minutes from the excitement of downtown Toronto”.

The press releases announcing the opening of the Howard Johnson identify it as the former Skyline Triumph at Keele and 401. It is now accurately described as the “Howard Johnson” Hotel at Keele and 401.

24. The location of the hotel is important - as Mr. Phillips confirmed in his evidence. He testified that:

“This business is location, location, location, and if you have the facility and service and credibility to go with it...”.

The repetition underlines the importance that Mr. Phillips ascribes to the location.

25. Mr. Phillips testified that his competitors were also defined on the basis of location, and that one of the first things he tried to do was attack the local and regional market, by establishing contacts with local businesses and travel agents. His efforts have been at least partially successful.

26. Accomodex has entered into contracts with many of the regular corporate and government clients of the Triumph Hotel, including the Ministry of Transportation, on similar terms to the previous contracts between those clients and the Triumph Hotel, and as a result, certain regular business has been obtained for the Howard Johnson Plaza Hotel. The head office for the Ministry of Transportation is located directly across Keele Street from the hotel.

27. Kelloryn has entered into a licensing and operating arrangement with Accomodex, whereby Accomodex undertakes the day-to-day operation and marketing of the hotel. The arrangement with Accomodex makes the hotel into a “Howard Johnson” facility and gives Accomodex extensive and exclusive rights to run the operation.

28. Accomodex has the authority from the Howard Johnson Hotel chain to add additional hotel franchises to a system which now includes about six hundred Howard Johnson Hotels in North and South America. There are no Howard Johnson Hotels in Canada which do not have an accompanying Accomodex licensing arrangement. In addition, eight of the twenty-five Howard Johnson Hotels in Canada are operated by Accomodex on behalf of the owner/franchisee in accordance with operating agreements similar to the one between Accomodex and Kelloryn.

29. The Howard Johnson franchise system provides a recognized “name brand” marketing advantage, as well as consulting resources for the franchisee. Some of these advantages were outlined in a proposal letter from Mr. Phillips, for Accomodex, to Ron Kelly, President of Kelloryn Consulting Inc. That letter, dated June 25, 1992 reads, in part:

**SUBJECT: Skyline Triumph.**

This letter will serve to confirm AFM’s (Accommodex) serious interest in formulating a long term Howard Johnson franchise agreement and Accommodex operating agreement on the hotel property currently known as the Skyline Triumph Hotel in North York, Ontario.

Accommodex would operate the property at the Plaza level, and would utilize the Howard Johnson reservation referral system and sales and marketing network as a supplement to the hotel’s local and regional marketing efforts.

Accommodex would be prepared to proceed on either a straight Howard Johnson franchise or Accommodex Operating Agreement basis, however we would recommend that the potential

investors in the hotel consider both the Howard Johnson system and Accomodex management resources as a potential dual benefit that is available to maximize the overall marketing efforts of the hotel and the day to day control of the operating entity.

However, the Howard Johnson chain did not buy the hotel. Kelloryn bought the hotel, which it then affiliated with the Howard Johnson system.

30. The proposal letter goes on to detail the various fees and royalties which are payable for these services. There is a franchise fee, a room royalty, a separate agreement for the reservation system with a fee payable on the basis of gross room sales, and access to the Howard Johnson national media campaigns, marketing programs, and sales efforts. This access, too, involves a fee based on gross room sales.

31. The operating agreement and the franchise agreement both have a term of twenty years. Mr. Phillips testified that, since 1989, Accomodex has added thirteen "properties" to the Howard Johnson group.

32. The details of the Accomodex/Kelloryn operating agreement need not be reproduced here. It suffices to say that Accomodex retains complete control and discretion in the management of the operation in all its aspects - including labour relations. Accomodex is responsible for the selection, employment, termination of employment, supervision, direction, training and assigning of the duties of all employees, and may enrol those employees in pension plans, benefit arrangements (including multi-employer plans) as it considers appropriate. Accomodex conducts all labour relations activities, including grievance and arbitration proceedings, and collective bargaining negotiations. In these proceedings, Accomodex appeared on its own behalf and on behalf of Kelloryn. But Accomodex does not "own" the hotel - by which, in this context we mean, the land, premises, building equipment, chattels, stock-in-trade, and so on. Accomodex organizes and "runs" the operation for Kelloryn.

33. It is interesting to note that Accomodex and Kelloryn are both entitled to assign the operating agreement to any "successor" which may result from any merger, consolidation, or reorganization, or to any "affiliate or related entity" to Accomodex or Kelloryn (defined as someone owning half their shares or net assets) which acquires all or substantially all of the business or assets. Any such assignee must assume and agree to be bound by the terms and provisions of the operating agreement. Likewise, if Kelloryn wishes to mortgage its property, it must bind the mortgagee to continue the operating agreement. These commercial arrangements tie the operating agreement to the hotel operation at Keele and 401 in somewhat the same way that Local 75 claims that its collective agreement is tied to that operation by virtue of section 64 of the *Labour Relations Act*.

34. There is no doubt that the Howard Johnson connection was considered by Kelloryn to be important for the hotel business at Keele and 401 - otherwise, it would not have entered into the franchise arrangement. But there is no hard evidence about *how* important the Howard Johnson connection is, or what proportion of the clientele patronizes the hotel *because* it is operated as a "Howard Johnson" or by Accomodex for that matter. Mr. Phillips estimated that 75-80% of a hotel's profits are derived from room sales, and only 10-15% are derived from its food and beverage revenues. Approximately 80-85% of room occupancy is booked in advance, and only 10-15% involves last-minute direct booking, or off-the-street trade. Mr. Phillips estimated that 20-25% of room nights were generated through the reservation system in conjunction with association bookings, and trade groups; but, again, it is difficult to determine how much of this is attracted by, or associated with, the Howard Johnson name.

35. On the other hand, there is not much doubt that, in a formal sense, any goodwill associated with the Triumph *name* had vanished by December 19, 1992. However, the location involved inherent advantages which the new owner was able to acquire without any express transfer of “goodwill” and was able to tout - apparently successfully - both in its general advertising and its approaches to former users of the hotel facilities.

36. Prior to its closure in July 1991, the Triumph Hotel offered the following services: rental of guest rooms, meeting rooms and banquet rooms; a dining room, lounge, cafe and room service, all serving food and alcoholic beverages; housekeeping and maintenance; a laundry; portering; mini-bars in some rooms; and a telephone service. The Howard Johnson Hotel offers much the same. Its services include: rental of guest rooms, meeting rooms and banquet rooms; a dining room, lounge, cafe and room service, all serving food and alcoholic beverages; housekeeping and maintenance; a laundry; portering, mini-bars in some rooms, and a telephone service. The nature of the business and the nature of the work remain the same; moreover, the hotel competes in and serves the same geographic market, and has been successful in attracting some of the same local clientele.

37. Mr. Phillips testified that on or about December 1, 1992 Accomodex hired about 150 employees. He said that Accomodex conducted a “job mart” in the first ten days of the hotel’s operation, to sort through some 4,200 applications that it had received from prospective employees. No effort was made to notify, recall or recruit former employees of the Triumph, although about 10 such employees were eventually hired. There is no evidence that Accomodex/Kelloryn made any effort to contact Local 75 which was still “on the scene”, as late as November 1992, a month before the hotel reopened. Instead, Kelloryn signed a voluntary recognition arrangement with the UFCW.

38. One of the employees now working in the hotel, who previously worked there, is a Mr. Gomes, who was a maintenance supervisor for the Triumph. Mr. Gomes remained on the scene throughout 1991 and 1992 in order to safeguard and preserve the hotel’s mechanical systems. Mr. Gomes has specialized knowledge of the building and was engaged by Accomodex in much the same capacity as he was employed by the Triumph.

39. The vast majority of the employees now working at the hotel were never previously employed there. The evidence does not specify the precise hiring date for these workers, although they could not have been actively at work much before the hotel opened on December 1. As we have already noted, there is no evidence that any of these employees were members of or wished to be represented by the UFCW by November 20, 1992, the date on which it had executed its collective agreement with Kelloryn, the purchaser of the hotel. There is no evidence of any previous collective bargaining or other relationship between the UFCW, Accomodex or Kelloryn, or the Triumph organization.

40. The duties undertaken by the employees now working in the Howard Johnson Hotel are essentially the same as those undertaken by the employees working at the Triumph. The job classifications in the Local 75 agreement are virtually identical to those in the UFCW Agreement - although the wage rates in the Local 75 agreement appear to be higher. No one disputes that the character of the work and the “character” of the business are the same.

41. We think it is also fair to take notice of the fact that the changing of hotel names and owners occurs in the Toronto area, as does the renovation of hotel facilities. It is not infrequent for hotels to move from one chain to another. Mr. Phillips cited an example: a local Howard Johnson Hotel near the airport has recently been “defranchised” and will become a “Delta” facility.

42. The parties have agreed that:

13. Documents and records remained on the premises at the time of the sale of the Triumph Hotel, and remain in the possession of Accomodex, including personnel records (scheduling, payroll, pension/health and welfare benefits and dues records), budget and other financial records, guest registration records, lists of suppliers, lists of clients including corporate clients, and other documents relating to the operating of the Triumph Hotel prior to its closure. Paragraphs 5(a) and (b) of the Agreement of Purchase and Sale specifically provided that Kelloryn was to be provided with copies of all contracts and leases concerning the property and former hotel operations, and Paragraph 17 of the Agreement provided for the assignment of all leases to Kelloryn.

However, Mr. Phillips testified that these documents were not particularly useful. Accomodex had its own marketing plan arranged prior to the completion of the sale transaction involving, for example, its own survey of Chamber of Commerce business listings for prospective clients in the area. These endeavours by Accomodex were one of its selling points to Kelloryn, and part of the general business plan with which Kelloryn eventually agreed.

43. There is no evidence that Accomodex brought any significant physical assets to the hotel operation at Keele and 401, but it has the operating expertise, management systems, and link to the Howard Johnson organization which, it is hoped, will contribute to the hotel's business success. Mr. Phillips has twenty-eight years of experience in the industry and has worked for several hotel chains. However, the current general manager of the hotel was an "external candidate", who was not drawn from the organization of Accomodex, Howard Johnson, or the Triumph.

#### IV

44. The issue before us, then, is whether Accomodex/Kelloryn has acquired the "business" or "part" of the business of the Triumph, within the meaning of section 64 of the Act. If that has occurred, Local 75 continues to have bargaining rights for the employees who work at the hotel, and those employees continue to have whatever rights or obligations are specified in the Local 75 collective agreement. Section 64 prevents a dislocation of the collective bargaining status quo by transforming the bargaining rights of the union and the collectively-bargained rights of employees into a form of vested interest which, like a charge on property, runs with the business (or part of the business). To accomplish that objective, the statute gives a rather special meaning to the word "sale", envisages that bargaining rights may be retained in a severable part of a business, and eliminates the significance of the separate legal identity of the new owner.

45. But does section 64 apply in this case? In addressing that issue, we do not think that it advances the analysis very much to describe the transaction under review as a mere "sale of assets". It certainly involves that; but even from a purely commercial law perspective, one way of buying a business is to purchase its assets. As Arthur Scace observed in his text, the *Income Tax Law of Canada* (5th ed.):

Although businesses may be consolidated in a number of different ways, e.g., by an amalgamation or winding up, there are only two methods by which a business can actually be bought or sold, namely the purchase and sale of either assets or shares.

A commercial lawyer would hardly consider it a novel proposition if it were suggested that a sale of a business could be accomplished by an asset transaction, or that someone could go into business by acquiring someone else's business capacity. To describe what has occurred here as an asset transfer, simply begs the question of whether there has nevertheless been a "sale" of all or "part" of the Triumph's business, for collective bargaining purposes, under the *Labour Relations Act*.

46. Similarly, we do not think that we should simply give a literal or dictionary meaning to the words “business” or “part of a business” that appear in section 64. Obviously, in this literal sense, the hotel facilities (lands, buildings, furniture, trade fixtures, equipment, etc.) were a “part” of the “business” of the Triumph which found their way, virtually en bloc, into the hands of Kelloryn/Accomodex. If the Board were to give the words of section 64 this stark literal reading, Local 75’s case would be unanswerable; and perhaps there is nothing particularly extraordinary about a successor in title inheriting the obligations of a predecessor. (We also note, parenthetically, that quite apart from “successorship” questions, the employees must ultimately look to the assets of the business to satisfy any financial claims based upon their collective agreement, so, in this respect, there is a practical connection between the collective agreement and the assets, even if in some legal sense the collective agreement binds something else.)

47. However, when interpreting section 64, the Board has not adopted this mechanical, literalist approach, nor has it automatically embraced common or commercial law concepts. The Board has recognized that it is dealing with a statutory code of rights and obligations which have few common or commercial law antecedents. Indeed, when one examines the subject matter of the statute, it becomes readily apparent that it involves concepts for which there is no common-law foundation, and for which a dictionary will not provide much assistance.

48. A trade union is not a “person” at common law, nor is it a corporation, but it is nevertheless a body that has statutory rights and responsibilities under the *Labour Relations Act*. A collective agreement - the product of collective bargaining - is not a contract at common law nor enforceable in a court, but it is nevertheless an enforceable creature of statute, with statutory attributes and features which might look quite curious to a common-law lawyer. (For example: it binds employees who are not parties to it, supersedes those employees’ individual contracts of employment, may be negotiated in some cases even though there are no employees to which it applies, yet cannot be ended early by the parties that negotiated it without this Board’s consent - sections 51, 123, 53(3) of the Act.) Bargaining rights - by which we mean a *legal agency relationship* between the union and a group of employees - are an artificial construct regulated by the statute in a manner which likewise cannot be understood outside the statutory scheme. Those bargaining rights do not attach to particular employees, they do not evaporate with employee turnover, and they do not even require the actual consent of employees (the “principals” if “agency” notions are pursued), whose wishes can only be tested, periodically, as the legislation permits (see the comments of Laskin, CJC in *Terra Nova Motor Inn*, 74 CLLC ¶14,253 at page 450). A collective agreement continues to operate even if there is a complete turnover of the employees to whom it applies (for example: if the Triumph had got its affairs in order and had reopened with a completely different employee complement). These are all statutory creations, peculiar to the world of labour law which has its own rules, internal logic, and balance of policy considerations. And those rules may not be completely congruent either with concepts rooted in other areas of the law, or with a “man on the street” understanding of business affairs.

49. These considerations may be self-evident for those familiar with the terms of the *Labour Relations Act*, but they are particularly evident in the way in which section 64 is drafted.

50. Under section 64 of the Act, a “sale” includes a lease or any other manner of disposition, thereby merging concepts which a commercial lawyer would consider legally distinct. The word “business” is undefined, but it is obviously intended to be a very elastic term, because it must be broad enough to encompass the activities of a wide range of public and private sector employers to which the *Labour Relations Act* applies (manufacturers, retailers, public utilities, municipalities, service businesses, school boards, social service agencies, etc.). Yet at the same time, for labour relations purposes under the statute, a “business” is something that, in some circumstances at

least, can be sensibly severed into its “parts” to which bargaining rights also adhere, and for which they and the collective agreement continue. A business also has a “character” which, if changed, may prompt the Board to terminate bargaining rights (see section 64(5) of the Act); moreover, businesses are distinct from their owners. An owner may intermingle an acquired business with a pre-existing one, which again may prompt the Board to re-fashion the bargaining structure, test employee wishes in a representation vote, or terminate bargaining rights (see section 64(6)).

51. Finally, if there is any doubt that the concept of successorship is a rather unique, policy-laden creature of statute, one need only consider section 64.2 which came into force on January 1, 1993. It *deems* a “sale of a business” to have occurred between independent suppliers of services, even though there may be no sale or disposition of anything between them at all, and the legal successor acquires from its predecessor none of the assets, equipment, etc. needed to supply the services. Bargaining rights attach to a relationship between employees, their work, and their workplace, regardless of who happens to be employing them from time to time. Under section 64.2 bargaining rights are maintained so long as there is a continuity of work done by unionized employees in that particular location.

52. Of course the fact that section 64.2 was recently added to the Act, suggests that relationships of this kind would not have been caught by the statute before (see for example, the analysis in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). However, the amendment underlines the proposition that successorship is part of a broader scheme of collective bargaining regulation that addresses a variety of mischiefs; and when the Board is interpreting that statutory scheme, one should not expect commercial law considerations to be paramount.

53. This is the theme explored by the Board in *More Groceries Limited*, [1980] OLRB Rep. Apr. 486. In *More*, the Board found that a sale of “part” of Loblaw’s business had occurred when Loblaw abandoned one of its local supermarkets in favour of a new superstore some miles away, and More acquired the discarded premises in order to expand its pre-existing grocery business. The Board concluded that, in this industry, the land, premises and location were a critical “part” of the “business”, capable of transfer, so that More was a successor employer within the meaning of section 55 [now 64] of the Act. The Board began its analysis this way:

15. Section 55 of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the Act together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried on simultaneously. An interesting early example of this unfair labour practice aspect of the provision can be found in the important *Thorco Manufacturing Limited* (1965), 65 CLLC ¶16,052 case, a case that today could be just as fairly dealt with under section 1(4). However, this purpose of the provision is not applicable in the facts at hand. We are satisfied that the relationship between the respondent(s) and Loblaw has been arms length and there is no evidence that the subject commercial transactions were other than for bona fide business purposes.

16. Unfortunately, however, the latter function of the section - providing some permanence to collective bargaining rights - is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis to this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55. See *John Wiley & Sons*

*Inc. v. Livingston*, (1964), 376 U.S. 543, 84 S. Ct. 909; Goldberg, *The Labor Law Obligations of a Successor Employer* (1969), 63 N.W.L. Rev. 735; Note, (1966), 66 Col. L. Rev. 967; Note, (1969), 82 Harv. L. Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not “ordinary contracts” nor are they in any real sense the simple products of consensual relationships. See *McGavin Toastmaster Ltd. v. Ainscough et al.*, [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55.

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term “sells” is defined to *include* “leases, transfers; and any other manner of disposition.” This all-embrasive definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term “business”, on the other hand, is simply defined to *include* “a part or parts thereof.” No similar exhaustive definition was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board’s jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term “business” in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has not made simple distinctions between asset and business dispositions. Rather, it has tried to make workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review. See *Gordons Markets* (decision of the Divisional Court of Ontario, unreported, November 21, 1978).

Somewhat similar comments were made in *Metropolitan Parking Inc.*, *supra*, where the Board wrote (in part):

26. The legislative history in this jurisdiction reveals an unbroken trend towards increased protection for employees and their union, and a concomitant increased obligation imposed upon successor employers. Legal doctrines such as “the corporate veil” or “privity of contract” have been de-emphasized, modified or eliminated so that a collective bargaining framework can be developed which will be in accord with industrial relations realities. Not surprisingly, the Board decisions follow a similar trend and, as a result, early decisions do not provide an unfailing guide to the results in later ones. Not only has there been a change in the statutory framework, but as the Board has accumulated experience and encountered more sophisticated business arrangements, there has been a development of its jurisprudence. It is important to emphasize, however, that section 55 of the Act has never been regarded merely as an “unfair labour practice” provision, directed at “schemes” designed to subvert bargaining rights. The section is also intended to preserve bargaining rights in the case of *bona fide* business transactions (i.e., transactions undertaken for purely commercial reasons and untainted by any anti-union motivation) which *incidentally* undermine the industrial relations *status quo*. This two-fold purpose was discussed by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

“The purpose of section 47a [now section 55] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect “paper transactions”, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond “paper transactions” to achieve that purpose. See e.g. *Kem’s Masonry*, [1964] OLRB Monthly Rep. December 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.”

In recent years most of the litigation before the Board has involved increasingly complex, but *bona fide*, business transfers which result in the same kind of dislocation as a simple bilateral sale. Collusive arrangements, or transactions explicitly designed to subvert bargaining rights have become much less common; and can, in any event, be dealt with under sections 56, 58 and 61 of the Act. (See, for example: *Sun Parlour Greenhouse* [1964] OLRB Rep. Jan. 94; *Intermountain Industries Ltd.*, [1975] 1 Can. LRBR 257 (B.C.L.R.B.); *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and, more recently, *Humber College*, [1979] OLRB Rep. June 820.) In the present case, there is no allegation that TAP and Metropolitan have been involved in an illegal scheme to undermine bargaining rights.

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27. The task of the Board in any particular case is to determine whether there has been a “transfer” or “disposition” of a “business” within the meaning of section 55 of the Act; and, if necessary, to sort out conflicting bargaining rights or problems of bargaining structure. Following the decision of the Court of Appeal in *R. ex rel Kitchener Food Market Ltd., et al.*, (1966), 54 D.L.R. (2d) 219, and the enactment of what is now section 55(12), the Board’s decisions in this regard have become “final and conclusive for the purposes of the Act.” It is the Board, therefore, which must give a meaning to the statute which will effect the legislative intention. The Board has always construed the terms “sale” and “business” broadly, in view of the collective bargaining purpose which the concept of successorship was designed to achieve. As the Board noted in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052:

“It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act*, R.S.O. 1960, c. 191.) Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.”

Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms “business” or “disposition” in other statutes is of limited assistance in determining their meaning in *The Labour Relations Act*.

54. A “business” is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market; and, over the years, the Board has come to what might be described as an “operational” or “instrumental” interpretation of that term. In *St. Leonard’s Society of Metropolitan Toronto*, [1993] OLRB Rep. Jan. 56, the Board put it this way:

The Board’s conception of the “business” under the *Labour Relations Act* is an operational or instrumental one. The business is not its legal envelope, nor the employees, nor some incidental or unrelated grouping of assets, nor the body of work in which employees may be engaged from

time to time. It is a delivery system, an economic vehicle, an organizational means of getting something done. It is to this vehicle that bargaining rights attach and in which they continue if the undertaking or a coherent part of it is transferred to a new owner.

This also seems to be the approach taken by the Supreme Court of Canada in *Syndicat national des employés de la Commission scolaire régionale de l'outaouais (CSN) v. Union des employés de service local 298 (FTQ)*, Bibeault et al. [1988] 2 SCR 1048 - a decision involving the successor rights provisions of the Quebec Labour Code. Beetz J. describes a business undertaking as something that "consists of a series of different components which together constitute an operational entity", and "all the means available to an employer to obtain his objectives".

55. The instrumental approach to successorship suggests that bargaining rights are attached to an economic vehicle - the mechanism, resources or facilities by which the undertaking serves its purpose - rather than the purpose itself, the employees, or their work. Bargaining rights attach to the business undertaking. The Board then tries to determine, from a labour relations perspective, whether the transfer and continuation of some facet or facets of that undertaking, warrants a continuation of bargaining rights - for, of course, when interpreting section 64, the Board has to keep in mind its purpose and effect. The Board tries to reach a result which is fair to both the statute and the context under review - that is, a result that appears to be called for to remedy the mischief for which section 64 was passed. That mischief is not the loss of work or work opportunities, but rather the disruption of bargaining rights which would flow from a change in the ownership but continuation of all or part of the elements that make up the business.

56. As a result of section 64, bargaining rights are not coextensive with commercial ownership or the continuing identity of *the owner*, nor does it matter how the new owner comes to have possession of the instruments necessary to carry on all or part of the functions of the predecessor. Bargaining rights continue with a continuation of the business undertaking or a part of it. The cases explore just what those instruments or elements of the business are, and what can be said to be the essence of the undertaking - land, equipment, location, employee skills, licences, patents, etc. They consider, from a labour relations perspective, whether a sufficiently-coherent grouping of those things has been transferred so as to warrant a continuation of bargaining rights.

57. Accordingly, in deciding whether there has been a sale of the predecessor's "business" for successor rights purposes, the Board has found it useful to consider the extent to which the various elements of the predecessor's business can be traced to the alleged successor - that is, whether there has been an apparent continuation of the predecessor's undertaking or organization, albeit with the change of owner. This "tracing" approach was considered by the Board in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed January 18, 1979) where the Board listed some of the factors which might be significant in deciding if there had been a transfer of the predecessor's business:

In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an

independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before ...

58. If many of the elements that made up the predecessor's business organization can be found in the hands of the successor, and are used for the same business purposes, there is an inference that there has been a transfer of a business to which section 64 applies. The more the transferee's ability to carry on his business is derived from or dependent upon things acquired from the proprietor of the predecessor business, the stronger the inference will be - particularly if the predecessor has ceased to carry on its business or has withdrawn from the relevant market. Continuity of the economic mechanism or vehicle points towards a "successorship" within the meaning of the Act - which is to say the application of a provision that results in a continuation of the institutionalized collective bargaining relationship. The issue before the Board, of course, remains whether there has been a transfer of a "business" or "part" of a business within the meaning of section 64; but it is much easier to make that finding, with the result that the collective bargaining relationship will be continued, if there is a substantial continuity of the other elements of the predecessor's business organization.

59. As might be expected in a labour relations statute, the Board pays particular attention to the "character" of the business (a matter referred to in section 64(5)) and the characteristics of the employer/employee relationship, because, from a labour relations point of view, the importance of the business is that it generates work opportunities for employees. The activities of the business require it to enter the labour market as an employer, and this, in turn, can give rise to the employment or collective bargaining relationships with which the Act is concerned, and which section 64 is designed to preserve. Accordingly, in determining whether there has been a "sale" within the meaning of the Act, the Board attaches particular significance to the nature of the work performed in, and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transfer is substantially similar to the work performed prior to that transaction (and if the employees, or types of employees, are the same) this would normally support an inference that there has been a transfer of a business or part of a business within the meaning of section 64. This approach with its focus on jobs is one that seems to have been taken by the B.C. Court in *R v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.* (1969) 3 D.L.R. (3d) 41. At page 52, Dryer, J. commented:

The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors, such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.

60. Unless there is a continuation of work and jobs, it would make little sense to preserve the collective bargaining relationship or collective agreement. Conversely, if the work, jobs, or employees are the same or substantially similar, it is easier to conclude that the transaction is one to which section 64 was intended to imply - and that is especially so if the work is being performed in the same context, at the same location, with the same equipment, or in respect of the same clientele.

61. However, a successorship finding does not depend upon a continuation of the very employees who worked in the predecessor's business before, any more than bargaining rights or the continuing operation of the business depend upon maintaining the employment of particular individuals. Employee turnover does not erase bargaining rights, just as the departure of employees does not automatically mean that bargaining rights travel with them - even though the employ-

ees are “part” of the business. Moreover, to emphasize the transfer of identifiable workers would invite the new owner not to continue their employment, lest their previous union affiliation influence the Board’s successorship conclusion. (This is not a hypothetical problem - see the comments of the panel in *Gordon’s Markets*, [1978] OLRB Rep. July 630 at paragraph 24; and note the unusual (and illegal) scheme by which the employer in *Metropolitan Parking* sought to avoid hiring former union members who had worked for the predecessor before.)

62. None of the parties referred us to any previous Board cases involving a hotel, but most of the tavern cases which were referred to in argument were analyzed by the Board on what we have described as the “operational” approach to section 64. For example, in *Katrina’s Tavern*, [1978] OLRB Rep. Sept. 838, the predecessor’s establishment was described by the Board as a bleak and rather shabby undertaking, with loud music, mediocre food, and a rough clientele, which eventually closed because of its financial difficulties. It was sold to a new owner who sought to renovate the premises to establish an elite, gay club. The goodwill of the former bar was of no value (or even negative value); nevertheless, the Board concluded:

18. The Board has in the past determined that the absence of goodwill in a transaction is not of itself determinative in deciding whether there has been the sale of a business within section 55 of the Act. (See, for example, *Winiker Industrial Auctioneers Ltd.* [1978] OLRB Rep. Jan. 15 and *Culverhouse Foods Ltd.* [1976] OLRB Rep. Nov. 691.) The Board is interested in whether there has been a continuation of the business. Here there was a transfer of the liquor licence, a leasehold interest, various tangible assets, and interests in contracts virtually all of which could and would be used to carry on the business of the sale of food and drink. Therefore, it would seem that there was a continuation of the business in which The Forge was engaged and, unless section 55(5) operates, a sale of a business within the meaning of section 55. The fact that the business was closed for approximately eight months does not affect the conclusion in this case. The Employer here was closed to affect repairs and renovations and was prepared to open whenever these were completed. There was still a transfer of assets and most importantly, after this transfer the same sort of business continued to operate from the premises.

63. Similarly, in *Krush*, [1987] OLRB Rep. June 859, the successor acquired a tavern formerly known as “The Benny” which was renovated and reopened four months later as the *Krush*. The Board concluded that the essential elements of the business - the premises and liquor licences - had been acquired and were being continued by the new owner, so that there was a successorship under section 64 of the Act - even though the new owner proposed to change the ambience and clientele, and had bought what was admittedly a deteriorating business. The Board noted that types of entertainment, themes, and patrons come and go, with or without a change of ownership; however, the essential elements of the drinking establishment remained and had, in this case, been acquired and continued in the hands of the successor. The Board was not persuaded that there had been any change in the nature of the work or “character” of the business within the meaning of, section 64(5) of the *Labour Relations Act*. (See also *Vivace Tavern Inc.*, [1982] OLRB Rep. Aug. 1224, *Blondie’s Entertainment Limited*, [unreported] Board File 2073-83-R, *Cabbagetown Inn Limited*, [unreported] Board File 2780-80-R, *The Last Resort Hotel Inc.*, [1984] OLRB Rep. Dec. 1700, *Jimmyz II*, [1977] OLRB Rep. Sept. 572, and *Horseshoe Tavern*, [1981] OLRB Rep. Sept. 1237. For a recent British Columbia decision to the same effect, see: *Three B’s Enterprises 90 CLLC* ¶16,022), and ¶16,050.)

64. Most of the cases under section 64 involve an alleged sale of a business in its totality. Only a few consider the meaning to be ascribed to the words “part of a business”. Yet those words pose much more difficulty than the term “business” itself. Almost anything actually traceable to the predecessor could be considered “part” of its business, but it cannot have been intended that every minor disposition of surplus assets should give rise to a successorship. To accept that view, would make section 64 the vehicle for extending rather than preserving bargaining rights. That is

why the Board has not accepted a literal or dictionary definition of the words “part of a business” and has been much less inclined to find a successorship where the transferee already has its own existing undertaking or capacity.

65. The content of the term “part” of a “business” must be considered in the particular factual context; however, a few cases may illustrate the way in which the Board has interpreted those terms. The Board has found a transfer of “part of a business” where one of a chain of retail stores has been sold to a competitor (*Loblaws Groceries*, [1973] OLRB Rep. Jan. 72, *More Groceries Limited*, *supra*); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244); where there was a transfer of the oil burner and installation service of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1972] OLRB Rep. May 515); where a slaughterhouse which was formerly part of a much larger integrated meat-packing company was transferred to a new owner (*Beef Terminal*, [1980] OLRB Rep. Aug. 1167); where the shock-absorber portion of a much larger business was transferred to a firm which leased the machinery equipment, tools and a portion of the premises used by the predecessor (*Canack Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where a firm acquired the premises and some of the equipment used by the predecessor to produce two products which had accounted for only a small portion of the predecessor’s total production (*Alcan Building Products Limited*, [1968] OLRB Rep. May 212); and where a firm took over some of the functions of a larger enterprise using some of the equipment, employees or a portion of the premises formerly used by the larger business to serve at least some of the same customers (*Vaunclair Meats Limited*, [1981] OLRB Rep. May 581, *Antonacci Clothes Inc.*, [1984] OLRB Rep. July 887, involving respectively a meat purveyor and a clothing manufacturer). (c.f.: *Central Native Fisherman’s Co-operative et al*, [1977] 1 Can. LRBR 329, the British Columbia Relations Board found that there had been a transfer of a “part of a business” when a cannery which was formerly part of a much larger business organization was sold to a fisherman’s co-operative.)

66. In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable “part” of its economic organization - managerial, or employee skills, plant, equipment, know-how, or goodwill - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This “new” economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union’s right to bargain about them were preserved. The “part” of the predecessor’s business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.

67. In all of these cases, there was a transfer of a distinct part of the predecessor’s configuration of assets or capacity to carry on business, and no material change in the character of the work performed by the employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, and the skills of the employees; and, but for section 64, the established bargaining and collective bargaining rights would have been lost. This was the mischief to which section 64 is directed, and the Board was satisfied on the evidence in each of these cases that it should be applied.

68. All of the cases to which we have referred recognize that there are no easily administered, mechanical tests which permit the Board to distinguish between a “mere sale of assets” and a sale of “part of a business”. As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1193 at paragraph 34:

This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a ‘business’ or ‘a part of a business’ and the transfer of ‘incidental’ assets

or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.

69. The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Indeed, much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; and, quite frankly, the results in some of the cases are difficult to reconcile -reflecting, among other things: the quality of the evidence before the Board in particular cases (especially before and after the passage of what is now section 64(13)); the quality of the argument; and the evolution of the Board's jurisprudence as various panels, over the years, have assessed in new factual settings, the "mischief" to which section 64 was directed.

70. But to dismiss the difficulty so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a "sale of a business" finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets - physical plant machinery and equipment - may be of paramount importance; while in others it may be patents, "know-how", technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities, and in each of these sectors the nature of the business organization is little different. Yet in each case section 64 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish. To cite but one unusual example: in *Riverview Manor*, [1983] OLRB Rep. Sept. 1564 (application for judicial review dismissed February 5, 1985), the Board found that a licence to run a nursing home business was a critical part of that business, to which bargaining rights could attach, even though the purchaser of the licence later invested a substantial sum to build its own nursing home across town. In that highly-regulated business, the licence was viewed by the Board in that case as the key asset - as evidenced by the substantial sum that had been paid for it.

71. Finally, it is important to recognize that not only do the cases arise in a variety of different contexts so that direct comparisons are difficult, but the law itself has not been static. Although the Board strives for consistency, the statute has been amended on several occasions, and with increasing experience, the Board has developed a more coherent theory of successorship. Indeed, from time to time, the Board revises its approach in accordance with its accumulating experience. (See, for example: *St. Leonard's Society*, [1993] OLRB Rep. Jan. 56, *Parnell Foods Limited*, [1992] OLRB Rep. Dec. 1164 and *Mil-Dom-Ex Packaging*, [1992] OLRB Rep. Dec. 1155). As with the common law, the utility of a particular approach to interpreting the *Labour Relations Act*, or the significance of a particular "test", only emerges with experience, and an evaluation of alternatives which may not be considered until a concrete case presents them.

72. In cases which arose when the economy was buoyant, or transactions involved a whole, ongoing business, the Board once tended to focus on the dynamic quality of a business or its operation as a "going concern". If that dynamic quality was lacking, the Board was inclined to hold that there had been no transfer of a business but merely a disposition of assets. In more recent years

and more troubled economic times, the absence of this dynamic quality has been accorded less significance.

73. Quite apart from questions of successorship, it has become much more common in recent years for businesses (or parts of them) to shut down for periods of time and lay off employees, then reopen again when the market improves - without anyone suggesting that the union's bargaining rights or the employees' recall rights, for that matter, have disappeared. In this era of corporate "restructuring", it has also become much more common for businesses to discontinue or hive off portions of their operation or undertaking, which then become the nucleus or even the entire undertaking of the "new" business organization. If instead of reopening on its own, or reviving this commercially-moribund portion of the operation, it was transferred to someone else - as increasingly happened through receivers - it was much less clear than it once might have been, that bargaining rights should disappear merely because that portion of the idle undertaking was now owned by someone else - especially since the purpose of section 64 is to eliminate the significance of the fact that a new legal entity owns the "things" that have been transferred. Clearly there is a potential tension between commercial law considerations, a layman's view of the "business", and the objectives reflected in the *Labour Relations Act*, but it has become much less evident in recent years that this tension should be resolved by the Board "reading into" the statute the words "as a going concern", after the word "business" in section 64(2). The concept of a "going concern" and the words "as a going concern" are not unknown in law, but in drafting section 64, the Legislature has not injected that phrase and it is not intuitively obvious that the Board should be doing so as a matter of interpretation. This is not to say that the absence of ongoing activity is irrelevant; merely that it may not be determinative.

74. If a new investor bought the controlling shares in a dormant company with idle assets and brought them to life with an injection of capital, there is little doubt that the union's bargaining rights would continue in respect of that company now that it had become active. A union would not need to invoke section 64 because, although there had to be a "sale of a business" in common parlance and commercial law terms, the legal entity with which it has bargaining rights - the "owner" of the assets - would be unchanged. Bargaining and collective agreement rights would continue. Should the result be different from a collective bargaining point of view, if the same investor used the same funds to purchase the assets themselves rather than controlling shares in the corporate envelope, but, as before, revived the business as a going concern under new ownership?

75. With the experience of two recent recessions and a considerable amount of corporate restructuring, the Board is less inclined than it once might have been, to give overriding significance to the absence of ongoing business activity at or before the point of alleged "sale". A business shut-down or closure remains significant, but it is not always determinative. As the Board noted recently in *New Dominion Stores*, [1989] OLRB Rep. May 473:

Similarly, hiatus between closure and opening [of a business] is not determinative, but only one factor. The fact that the hiatus between the closure of Dominion Store #986 and the opening of the A & P Store was quite long, twenty-two months, does not itself mean that the business of the former has not been transferred to the successor. There is no temporal bright line beyond which bargaining rights will not transfer. If all the circumstances yield a conclusion that a business, or part thereof, has been transferred, then the appropriate declaration will issue, whether the interval be twelve months or twenty-two months".

Thus, in *Hughes Boat Works Inc.*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed: (1979) 26 O.R. (2d) 420 (Div. Ct.)), the predecessor "North Star" encountered economic difficulties, ceased operations ("went out of business" in layman's terms) and closed its plant which was transferred after several months by a receiver to "Hughes" which began to build boats again. Hughes claimed that the predecessor's business had failed - as demonstrated by the plant closure -

and that it had merely purchased the asset shell. But the Board found that Hughes was a successor employer within the meaning of section 55 [now 64] of the Act.

76. Finally, for the purpose of completeness, we should note that just as we have no details of the financial problems which the Triumph experienced, neither were we told about the particular legal proceedings in which it was engaged prior to its commercial demise (but which would appear to involve a court-appointed receiver and/or a receiver in bankruptcy). No one argued that the federal or provincial bankruptcy/insolvency law governed the way in which the Board could or should interpret section 64 of the *Labour Relations Act*, and the relief sought before us, does not involve any claim against Accomodex/Kelloryn in respect of the period that the hotel was operated by its previous owners.

## V

77. The evidence in the present case indicates that Kelloryn/Accomodex has acquired ownership and control, *en bloc*, of virtually all (or at least a very substantial portion) of the tangible assets of the Triumph, formerly used by the previous owners in their hotel business at Keele and Highway 401. Those assets are now being used by the new owner, in much the same way as before, to supply the same general services, to much the same general market, and at least some of the same customers. We do not know the value of this asset configuration in relation to the renovation and refurbishing program which is now underweight in the "Howard Johnson" Hotel, but we do know that without what the respondents acquired from the Triumph, they could not engage in the economic activity from which they derive most of their revenue: the rental of rooms and the provision of subsidiary services. It is perhaps trite to say so, but without a hotel (with its restaurants, parking lot, ballrooms, meeting rooms, swimming pool and so on), one could not be in the "hotel business" at all, or at that location; and as Mr. Phillips stressed in his evidence, location is a critical element of that kind of business.

78. The respondents did not assemble these elements themselves or put the package together - they bought them largely intact. This was no acquisition of incidental or surplus assets. Accomodex/Kelloryn acquired the asset core of the Triumph. And while the Triumph Hotel was closed for some time, the "new" hotel was opened within three months of its purchase by Kelloryn, which then entered into the operating and Howard Johnson's franchise arrangements with Accomodex. No doubt Kelloryn hopes that these connections will enhance its profitability and efficiency, but it could still be in the hotel business without them. If Kelloryn decided to operate the hotel itself, hiring more outside managers (like the general manager), or if it were "de-franchised" (like the Delta Hotel that Mr. Phillips mentioned), the core of the hotel business - the hotel, its location, and the consequent relationship with its local market - would remain. That unionized core would continue to be unionized - whether that union was Local 75 or the UFCW; and, it is interesting to note, that the UFCW saw nothing incongruous about signing its collective agreement with the *asset owner* before its "business" actually opened "for business".

79. It is also clear that substantially the same jobs are being performed in substantially the same place in respect of substantially the same services for a similar market. There has been no qualitative transformation of the business or the work or the kinds or classifications of employees working in the hotel. There has been no change in the "character" of the business, and the actual job classifications in the UFCW agreement are virtually identical to those in the Local 75 agreement. There would be no operating incompatibility if the Local 75 agreement were applied to the hotel operation until September 30, 1993 when its terms may be re-negotiated (and, incidentally, the workers then employed will have an opportunity to oust Local 75 and choose another union to represent them if that is their wish). There is no anomaly in applying a "hotel collective agree-

ment” to a hotel. The employees themselves are not the same; but that is so, at least in part, because Kelloryn/Accomodex made no specific effort to recruit the former employees or approach Local 75.

80. It is true that certain elements mentioned by the Board in *Culverhouse, supra*, were not transferred, but these are either of little significance in the hotel business, or are irrelevant on the facts of this case. There is no “inventory” or “stock-in-trade” or “machinery” of the kind that a manufacturing concern might have, and, on the evidence, we are not persuaded that what was owned by the Triumph but not acquired was very significant to the new owner’s ability to operate - at least in comparison with what was acquired. Of course, the new owners had to arrange their own financing to purchase this essential “part” of the Triumph organization, and, having done so, undertook some new initiatives, and hoped to acquire customers not previously served by the Triumph. This is not insignificant, but section 64 is triggered by a change of ownership, and it would be a most unusual “sale of a business” transaction, in which the new owner did not put his own imprint on the organization by undertaking new business initiatives, or introducing at least some new directions in management. More important, in the present case, is the fact that there has been no significant change in the “character” of the business from the way in which it operated as the Triumph.

81. We have not ignored the fact that the new owners of the hotel may not have considered themselves to be “purchasing” the Triumph’s “business” when they bought the bulk of its assets and continued to carry on the same kind of business from the same location. No doubt from a commercial or layman’s perspective, the Triumph’s “business” was “dead” as of the date it closed in July 1991. However, we do not think that hiatus is conclusive where, as here, the asset configuration has remained substantially intact and continues (albeit with renovations) at the core of the “new” business organization. Our decision has the effect of affixing bargaining rights to an asset configuration, but in all the circumstances, we do not think that this is inappropriate when this “part” of the predecessor’s organization is so integral or essential to its operating capacity.

82. For the foregoing reasons, we concluded that the transaction by which Kelloryn/Accomodex acquired the land, premises, trade fixtures, etc. formerly used by the Triumph, was a “sale” of a “business” for the purposes of section 64 of the *Labour Relations Act*. It follows that Local 75 continues to have bargaining rights for the employees working in the hotel, and the Local 75 collective agreement determines what their terms and conditions of employment will be.

83. In accordance with the agreement of the parties, that was the only issue which we were asked to determine, so we make no finding on the precise legal identity of the “successor employer”, nor do we need to address any other portion of section 64.

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**2716-92-R** Brewery, Malt and Soft Drink Workers, Local 304, Applicant v. Alexandria Sash & Door Co. Limited, Responding Party v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, Intervenor

**Certification - Pre-Hearing Vote - Representation Vote - Board's Returning Officer missing first two of three polling times due to snow storm, but parties agreeing to substitute new time for earlier two and voting proceeding - At completion of balloting, parties signing "consent and waiver form" and "certification of conduct of election form" - Incumbent union seeking new vote on ground that new voting time disenfranchised certain employees - Board declining to order second vote - Certificate issuing**

**BEFORE:** *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

**APPEARANCES:** *John McNamee*, *J. Cameron Nelson* and *Alain Lajoie* for the applicant; *Daniel Dubois* for the responding party; *Harold F. Caley* and *Andre Papineau* for the intervenor.

**DECISION OF THE BOARD;** April 16, 1993

1. This is an application for certification. The applicant, Brewery, Malt and Soft Drink Workers, Local 304 (the "Brewery Workers") seeks to represent a unit of employees of the responding party Alexandria Sash & Door Co. Limited (the "company") currently represented by the intervenor Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (the "Teamsters").

2. At the request of the Brewery Workers, and pursuant to an earlier decision of the Board, a pre-hearing vote was directed. Arrangements were made between a Board Officer and the parties for the vote to be held at the company's premises in Eastern Ontario at three different times on January 22, 1993. Unfortunately, on January 22nd, the Board's Returning Officer was waylaid by a snow storm and missed the first two polling times. However, on agreement of the parties, a new time was substituted for the earlier two and voting proceeded that day. At the conclusion of the vote, the ballots were counted and the results made known to the parties. Of the 94 employees on the voting list, 87 cast ballots. 45 employees voted for the Brewery Workers and 41 for the Teamsters. There was one spoiled ballot.

3. On January 29th, 1993, the Board received a statement of desire from the Teamsters' General Counsel, which states in part as follows:

The Intervener Union objects to the manner of the vote in that due to the late arrival of the Board Officer and the necessity for a change in the polling times, a number of eligible voters were not afforded the opportunity to vote on January 22, 1993. Since a number of eligible voters were thus denied the opportunity to vote, the Intervener Union hereby respectfully requests that another vote be held to determine the wishes of the employees in respect of the Application to Terminate Bargaining Rights.

On January 22, 1993, a vote was scheduled to be held at two (2) locations and three (3) times as follows:

1. Cafeteria, 95 Lochiel Street East, Main Floor Alexandria, 6:45 A.M. to 7:45 A.M.
2. Main Floor Lunchroom, R.R. #3 Alexandria Lochiel, 8:15 A.M. to 8:30 A.M.
3. Cafeteria, 95 Lochiel Street East, Main Floor Alexandria, 3:00 P.M. to 3:45 P.M.

Due to the unavoidable delay of the Board Officer to Alexandria, certain drivers working out of 95 Lochiel Street East were not able to vote at 6:45 A.M. to 7:45 A.M. Given the nature of the business, drivers would be dispatched and not back at the employer's location till after 3:45 P.M. These drivers were thus deprived of the opportunity to cast their vote.

The Intervener Union, through Mr. Andre Papineau, had advised the Board Officer of the Intervener's concern of the lack of opportunity for certain drivers to vote.

Four (4) drivers were affected and unable to cast their votes. The Intervener Union would request that the Board order another vote to take place.

The Intervener Union would request a hearing before the Board.

The Board scheduled a hearing to deal with the matters raised in the statement.

## I

4. At the hearing both parties called evidence as to the events of January 22nd. Mr. Andre Papineau testified on behalf of the Teamsters. He has been the president of Local 91 since May 1990. Prior to that he was the business representative. Mr. Papineau testified that the 6:45 a.m. polling time had been specifically requested by the Teamsters to accommodate the schedules of certain drivers who leave early each morning for lengthy trips out of town. He said that when the 6:45 a.m. and 8:15 a.m. polls were missed and a proposal was made to replace those times with a 12:15 p.m. to 1:15 p.m. polling time, he asked the Board Officer about the people who would not now have the opportunity to vote. In examination-in-chief, Mr. Papineau said that the Board officer replied, "let's go ahead with the vote anyway. If the difference is so big that it wouldn't impact the result, then there's no harm done. If the results are such that it would have made a difference, then you've got all the grounds for a re-vote.". In cross-examination, Mr. Papineau said that the officer's reply was, "you've got good arguments or all the arguments for a re-vote". Mr. Papineau later repeated the first of the answers given in cross-examination. Mr. Papineau said that this discussion took place in front of the scrutineer for the company, Marc Poirier, and for the Brewery Workers, Alain Lajoie. On the basis of that reply, Mr. Papineau testified that he agreed to proceed with the modified voting schedule.

5. At the completion of the balloting, the scrutineers, including Mr. Papineau on behalf of the Teamsters, signed the Board's "consent and waiver" form. This form states:

WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 22nd day of January, 1993.

AND WE hereby waive any objection as to the regularity and sufficiency of the balloting.

The same parties, along with the Board's Returning Officer, also signed the Board's "certification of conduct of election" form. The material part of this form states:

WE the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the date and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

Mr. Papineau acknowledged that he made no comments about the possibilities of a re-vote when signing these forms.

6. Mr. Alain Lajoie testified on behalf of the Brewery Workers. Mr. Lajoie is the chief steward for the Teamsters and acted as the scrutineer for the Brewery Workers. He was present

during the discussions for the revised voting arrangements. Mr. Lajoie testified that he did not know whether Mr. Papineau asked any questions about the employees who would be unable to vote. He added, however, that although the Board Officer may have said something about what might happen if the vote was “close”, nothing was said about a re-vote. Mr. Lajoie was not cross-examined on this point.

## II

7. Counsel for the Teamsters describes this as an “unusual case”. He submits that it ought not to be viewed as a contest between two litigants, but relates to the integrity of the Board’s voting process and to the rights of employees to vote. Counsel says that when the first two polling times were missed, the vote should have been cancelled. Instead, the parties dealt with the practical issue confronting them by entering into an “unfortunate arrangement”. This arrangement had the effect of disenfranchising seven voters. According to counsel, the parties ought not to be in a position to take away, by agreement, the rights of a single employee to cast a ballot. It is not up to the parties to determine when a vote does or does not have significance. The Board has an interest, counsel suggests, in ensuring that all representation votes are conducted properly so that there will be no second guessing by the parties about the outcome. Counsel seeks a new vote and relies on the following authorities: *Metroland Printing & Publishing Ltd.*, (Board File No. 1040-81-R decision dated February 26, 1982, unreported); *Rainy River Valley Health Care Facilities, Inc.*, [1985] OLRB Rep. Feb. 316; and *Cable Tech-co Ltd.*, [1988] OLRB Rep. June 562.

8. Counsel for the Brewery Workers notes that on the basis of Mr. Papineau’s own evidence the Teamsters were quite prepared to “disenfranchise” voters, so long as it would not impact on the outcome of the vote. In these circumstances, counsel submits, the Teamsters are in no position to be raising the rights of employees to vote. In any event, counsel points out that the possibility of certain eligible employees being unable to participate in a representation vote is an ever-present feature of the system. Voting times are set by agreement of the parties, and there is no guarantee that all of the employees on the voters’ list will be able to vote at the agreed times.

9. Counsel suggests that the Teamsters could have deferred the vote to another day. Instead, the parties agreed to proceed that day with no guarantees or promises about the outcome of the vote or opportunities for a re-vote. The parties then signed the waiver forms from which the Teamsters now seek to resile. In answer to a suggestion by counsel for the Teamsters that there would be no prejudice in having another vote, counsel for the Brewery Workers points out that three months have passed since the expiry of the collective agreement, and the employees ought not to be required to wait any longer to know who will be their bargaining agent. Counsel for the Brewery Workers relies on the following authorities: *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166; *Bravo Cement Contracting Ltd.*, [1980] OLRB Rep. Oct. 1354; *Ontario Cancer Foundation, Hamilton Clinic*, [1983] OLRB Rep. Feb. 246; *Golden Griddle Restaurant*, [1983] OLRB Rep. Oct. 1651; *United Plastic Components Ltd.*, [1984] OLRB Rep. Nov. 1636; and *Northfield Metal Products Ltd.*, [1989] OLRB Rep. Jan. 57.

## III

10. The Board agrees with counsel for the Teamsters that it has a definite interest in ensuring the integrity of the voting process, but takes a different view of what that interest demands under the circumstances.

11. Voting arrangements are typically made on agreement of the parties. The process was described by the Board in *Rainy River Valley Health Care Facilities, Inc.*, *supra*, at para. 14, as follows:

The timing of a representation vote is a matter which lies within the discretion of the Board. See section 103(2) [now section 105(2)] of the *Labour Relations Act* and section 68(a) and (c) of the Board's [former] Rules of Procedure. While the Board exercises these powers, it does so after consulting with the parties who are affected by the representation vote. These parties are in a better position to know the nature of the respondent's business and the impact that this may have on the conduct of a representation vote. Clearly, the availability and opportunity of employees to cast ballots in a representation vote is affected by predictable factors such as shift work, scheduling of work, reassignment, holidays and vacations. The availability and opportunity of employees to cast ballots is also affected by unpredictable factors such as illness, injury and weather. In the process of settling the date and hour of a representation vote, the Registrar provides the parties with suggested dates and asks for the agreement of the parties to two dates on the understanding that both of these dates are available for the Board to conduct the representation vote. The Board usually conducts the representation vote on the earlier of the two dates. However, for the purposes of flexibility and availability in utilizing its staff, the Board requires two dates which are equally acceptable to the parties.

In this case, the alternate date was January 29, 1993.

12. As the passage from *Rainy River* indicates, although the Board has the authority to determine the timing of representation votes, it routinely exercises this authority in consultation with the parties. It does so in recognition of the fact that it is the parties themselves who are best able to assess their workplace situation and determine the times that will maximize voter turn-out. Although the Board is not bound by these agreements, it typically seeks to accommodate them.

13. Once voting arrangements have been made, however, they are not quite cast in stone. Flexibility remains a hallmark of the labour relations process. Parties, under the auspices of the Board, are sometimes able to accommodate the unexpected. In *Golden Griddle Restaurant*, *supra*, for example, the parties agreed to amend the voters' list after the vote had been conducted but prior to the counting of the ballots in order to add the names of four individuals who had cast segregated ballots. This agreement was recorded on the "waiver and consent" form and enforced by the Board when one party sought to resile from it.

14. At any time during the balloting, or after the vote has been conducted, parties are also able to raise any concerns they may have about the regularity and sufficiency of the balloting or about the fairness of the voting process. In some cases, this may result in the ballot box being sealed and the votes being counted at a later date after the parties have had a chance to consider their positions and, possibly, make representations to the Board. Alternatively, the ballots may be counted immediately and the results made known to the parties forthwith. It is a truism in the certification process that "labour relations delayed are labour relations defeated and denied" and an early outcome is generally preferred by all parties. However, given the temptations for an unsuccessful party to seek to have an unfavourable result overturned, the Board requires the parties to sign "consent and waiver" and "certification of conduct of election" forms prior to an immediate count. This requirement seeks to accommodate the need for expedition to the certainty required by the Board's election and certification process. It will only be in the most exceptional cases that parties who have derived the benefit of an expeditious result will not be held to their signed waivers. There is a natural skepticism that arises when an unsuccessful party seeks, for the first time, to raise allegations before the Board about pre-vote conduct only after the results of the vote have been made known.

15. The importance of the waiver process and the effect of a signed waiver was described by another panel of the Board in *Golden Griddle Restaurant*, *supra*, at pages 1652-1653, paras. 8 and 9:

8. A general policy of enforcing waivers serves the purpose of finality. From the moment a

waiver is executed, the parties are assured that the result of the vote will not be overturned. A union that wins an election is quickly granted a certificate and so is able to immediately call management to the bargaining table. In the converse situation, an application for certification is promptly dismissed, freeing an employer to deal directly with the work force. Whatever the outcome, the parties can conduct their affairs accordingly, secure in the knowledge that any expectations or acts of reliance generated by the election will not be rudely unsettled. Finality would be served equally well by enforcing waivers signed either before or after ballots are counted. But only a waiver executed in advance of the count serves another purpose. As the election result is not yet known at this stage - even though educated guesses may sometimes prove to be accurate - there is less incentive, than after the count, to grasp at straw objections in order to avoid an unfavourable outcome. Indeed, there is always the risk that objecting at this time will negate an election that the objector won. In short, the uncertainty which prevails before ballots are tallied has a sobering influence on those who might otherwise cloak concerns over the outcome in manufactured objections to the propriety of the election.

9. What should be the Board's response to waivers entered into through inadvertence? To set a waiver aside whenever a mistake is made would be to dangerously undercut the objectives identified above. Moreover, some mistakes do not deserve relief. Consider, for example, an employer or a union that - unknown to the other party - errs in calculating the hours worked by an individual, then agrees that this person is eligible to vote as a full-time employee, but after the count discovers the error and objects to the election on this ground. Even though this objection is one of substance - the person concerned is not a member of the bargaining unit - finality ought not to be compromised to rescue a mistaken party from its own carelessness.

16. Similarly, in *United Plastics Components Ltd.*, *supra*, another panel of the Board stated at page 1640, para. 17:

A Board is naturally skeptical when allegations of earlier misconduct are raised only after the outcome of a representation vote is known. The Board is not prepared to permit a party losing a representation vote to cast about for any basis upon which to set aside the vote. If improprieties occurred which could have been discovered through due diligence and founded a complaint before the Board, those improprieties could well have been remedied before the vote was conducted. Or, the ballot box could have been sealed pending the outcome of the hearing into the allegations and a new vote directed, if necessary, after the appropriate relief had been ordered. The "due diligence" standard, then, prevents a party from having "two kicks at the can".

17. In this case, of course, it is the position of the Teamsters that these general principles do not apply or, in the alternative, that it exercised due diligence in raising its concerns prior to the vote having been conducted and the waivers signed. The Board does not agree.

18. While the evidence is that Mr. Papineau may well have raised a question with the Board Officer about the employees who might not be able to vote as a result of the changed times, the Board cannot find that any representation was made, or agreement struck, as to the possibility of a re-vote. The variable nature of Mr. Papineau's statements, the direct contradiction of these statements by Mr. Lajoie, the absence of any cross-examination of Mr. Lajoie on this point, the failure to refer to the representation or agreement in the statement of desire or to raise or record it when the "consent and waiver" and "certification of conduct of election" forms were signed, all tell against the Teamsters' position. While it bears noting that the Board's Returning Officers are not in a position to promise re-votes, had such a representation been made it is not too much to expect someone in the position of Mr. Papineau to have sought to record it as part of the wavier process. In the circumstances, therefore, the Board will not direct a second vote.

19. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

20. Having regard to the agreement of the parties, the Board further finds that all employees of Alexandria Sash & Door Co. Limited employed at Alexandria, Ontario and at Lochiel,

Ontario, save and except foremen, supervisors, those above the rank of foremen and supervisors, office staff and persons regularly employed for not more than twenty-four (24) hours per week, constitute a unit of employees of the responding party appropriate for collective bargaining.

21. The Board is satisfied that not less than thirty-five per cent of the employees of the responding party in the bargaining unit were members of the applicant at the time the application was made.

22. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

23. A certificate will issue to the applicant.

24. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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**0072-92-U Local 527, Office and Professional Employees International Union, Complainant v. The Board of Education for the City of Hamilton, Respondent**

**Duty to Bargain in Good Faith - Unfair Labour Practice - Union alleging that Board of Education breached duty to bargain when its elected trustees failed to approve proposed settlement put before them by their negotiators with recommendation for ratification - Board concluding that circumstances faced by Board of Education when asked to ratify had shifted sufficiently and generated sufficient economic uncertainty to warrant reconsideration of Board of Education's earlier collective bargaining stance - Change in circumstances following tentative settlement found to be real and compelling - Board of Education's decision not pretence or subterfuge - Complaint dismissed**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

**APPEARANCES:** *David P. Jacobs*, *Lynda Cook* and *Ana Misiti* for the applicant; *Mark Zega*, *Deborah Russon*, *Keith Rielly*, *Robert Stewart* and *Margaret Cunningham* for the respondent.

**DECISION OF THE BOARD;** April 21, 1993

**I**

1. This is a complaint under section 91 of the *Labour Relations Act*. The union alleges that the employer has failed to bargain in good faith with respect to the renewal of the parties' last collective agreement. Section 15 of the Act reads as follows:

15. The parties shall meet within fifteen days from the giving of the notice [to bargain] or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

Other sections of the Act were mentioned on the complaint form, but were not pressed in argument, and therefore will not be referred to further.

2. The union contends that the Board of Education (“the Board”) breached its statutory duty to bargain in good faith when its elected trustees failed to approve a proposed settlement that had been put before them for ratification. The union claims that it was unlawful for the trustees to refuse to ratify a settlement which had been deemed acceptable by the employer’s own negotiators only five weeks before.

3. The employer replies that the settlement was always tentative and was expressly (and intentionally) made subject to ratification by the elected trustees; moreover, between the time the tentative settlement was concluded and the time it came before the trustees for consideration, there were major changes in provincial funding arrangements. The employer concedes that the decision not to ratify was unusual but, in the employer’s submission, the change in the Board’s financial situation justified a reconsideration of the position earlier taken by its negotiating team. The employer maintains that it was and remains prepared to enter into a collective agreement with the union; however, both parties are now obliged to recognize new economic realities which had not crystallized when the original deal was struck.

4. It will be convenient to sketch in some general background, then turn to the events which prompted the Board to reject the tentative settlement. In order to assess the Board’s motivation, it is necessary to understand the financial and political framework in which it operates. Legalities aside, much of the union’s frustration in this case stems from the Board’s failure to respond in accordance with the union’s expectations, and, as will be seen, the union’s expectations were not the only ones jolted by the events of late 1991 and early 1992.

## II

5. The Board of Education for the City of Hamilton is responsible for the City’s elementary and secondary school system. The Board has some 4,000 employees, many of whom are unionized. The unionized employees are subdivided into 10 bargaining units which are represented by a number of different trade unions.

6. The largest bargaining units are composed of teachers, who are represented for collective bargaining purposes by the teachers’ federations designated under the *School Boards and Teachers Collective Negotiations Act*. The teachers’ salary and benefits reflect not only their professional status, but also the cohesion and bargaining power of their unions. Teachers’ strikes are not uncommon in Ontario, nor unknown to this employer.

7. The OPEIU represents a small bargaining unit of 82 clerical and secretarial employees. The workers in the OPEIU bargaining unit are primarily women and are among the lowest paid of the Board’s employees. The OPEIU and the Board have had a long and generally amicable collective bargaining relationship, which stretches over many years and a number of collective agreements.

8. The Board of Education is controlled by a body of elected trustees who have a responsibility under the *Education Act* to supervise the local education system. There are now 19 trustees who are elected every two years from defined geographic constituencies. The last election was in November 1991, when there was a substantial change in the Board’s membership, with the election of 5 new trustees. The election occurred in the midst of collective bargaining with the Board’s various unions, and it was the “new” Board which decided in January-February 1992 that the bargaining parameters had changed.

9. The Board derives its funds from two main sources: provincial grants channelled through the Ministry of Education, and property taxes levied on municipal taxpayers. Provincial grants ordinarily make up about one-third of the overall budget and are calculated in accordance with a complex formula administered by the Ministry of Education. The *total* budget (including capital items) is now around \$280,000,000. Salaries make up about 80% of the *operating* budget. Teachers' salaries make up the largest component of the salary item.

10. The Board of Education has the responsibility to budget and provide for its own spending; however, in recent years, that has become increasingly difficult. Shifting provincial priorities (e.g. full funding of Roman Catholic schools), changes in the funding formula, budget constraints, and the erosion of the municipal tax base have all affected the pool of funds available to the Board, as well as the Board's ability to predict the resources that will be available. The complexities of the budgeting process need not be explored here. It suffices to say that the Board must plan its expenditures on the basis of past trends, and such undertakings as it is able to extract from provincial politicians or administrators. And if the situation turns out to be other than what was anticipated, the Board is faced with the painful task of cutting expenditures or raising taxes. The Board does not operate in the private sector, but it is not immune from economic forces.

11. The roots of the current dispute can be traced to early 1991 when the Board produced its 1991-92 "pro-forma" budget. According to trustee Bob Stewart, this budget was constructed with considerable care, and was based on assumptions that seemed realistic at the time. Mr. Stewart was familiar with the budgeting process, and is currently Chair of the Board's Salary Committee. As Chair of the Salary Committee, he is heavily involved in salary negotiations with unionized staff. Coincidentally, Mr. Stewart is himself a union member and is also a local official of the United Steelworkers of America.

12. Mr. Stewart explained that in early 1991 when the pro-forma budget was developed, the trustees were comfortable with the premises upon which it was based. A new Provincial Government had been elected only three months before, on a platform that promised "full funding" for public education. There had been an undertaking to address the shortcomings of the past; and, similar assurances had been given by the locally-elected members of the Legislature, who were now part of the Government. Based on these undertakings, previous grant levels, and current trends, the Board projected that Provincial grants for 1992 would increase by at least 7%.

13. The pro-forma budget was the definitive document for planning and decision-making throughout 1991 - even though by mid-year some trustees began to worry that its assumptions were unduly optimistic. The pro-forma budget generated the "guidelines" for the salary negotiations that were to take place in late 1991 and early 1992. That guideline contemplated a maximum wage increase of about 4.5%, which was in line with the increase the Provincial Government seemed prepared to offer to public servants, and was considered "affordable" on the basis of anticipated revenue.

14. Some trustees thought the 4.5% guideline would be unacceptable to the teachers' federations, which might strike for better pay. Other trustees thought the guideline was too generous given the impact of the recession on public finances and the local tax base. However, 4.5% remained the employer's "negotiating mandate" for the bargaining which took place in the Fall of 1991. That bargaining involved the major teachers' federations, the OPEIU, and, a little later, the custodial/service group represented by CUPE.

15. The OPEIU collective agreement expired on August 31, 1991. The union presented its proposed amendments at a meeting with the trustees and their negotiating committee on Septem-

ber 18, 1991. The parties met for bargaining purposes on October 10, October 18, and November 14, 1991.

16. The union's chief negotiator was Linda Cooke. Ms. Cooke is a full-time staff representative for the OPEIU, and before that, had been an employee of the Hamilton Board of Education for about twenty years. The Board's spokesperson was Debbie Russon, its Manager of Collective Bargaining Services. Ms. Cooke and Ms. Russon had a good personal and professional relationship.

17. Ms. Russon reports to the Salary Committee which, as noted, is chaired by trustee Bob Stewart. The Salary Committee is responsible for overseeing salary administration and coordinating collective bargaining with the Board's various unions. The Salary Committee reports to the full Board, which retains the ultimate authority to ratify or reject proposals vetted by the Salary Committee. The Chair of the Hamilton Board of Education is Barbara Cunningham, who is also a member of the Salary Committee.

18. Bargaining with the OPEIU initially went quite smoothly, and the parties were able to resolve the language issues with relative ease. But wages remained a stumbling block.

19. On November 14, 1991 Ms. Cooke suggested that the parties suspend bargaining until the employer had settled with the teachers' federations. It was evident to Ms. Cooke that (as she put it) the "tail was not going to wag the dog". She saw no tactical value in applying for conciliation at that stage (a necessary step before the union could consider a lawful strike), because the teachers' settlements would significantly impact upon the employer's costs and set the framework within which the smaller unions would negotiate. It seemed sensible to await the outcome of the teacher negotiations because, in the past, the Board had been inclined to apply the teachers' pattern to the smaller bargaining groups.

20. The Board members were content with this proposal, and negotiations were suspended pending resolution of the teachers' disputes. It was anticipated that the teachers' bargaining would be completed in late 1991 or early 1992.

21. Throughout 1991, the Provincial economy continued to deteriorate, and by the Fall of 1991, that deterioration was becoming painfully apparent. The effect on the Board of Education is reflected in the Minutes of its "Budget Review Committee", which began struggling to match expenditure commitments with increasingly problematic revenue projections, while holding tax increases to 6%. It was not an easy task.

22. It was clear that the local economy was ailing, and that the commercial tax base was being eroded. Revenue was going to be lower than anticipated but lay-offs and higher local unemployment made it much more difficult for ratepayers to absorb tax increases. And, with an anticipated deficit of nine billion dollars or more, the Province was unlikely to provide much assistance. Accordingly, the Budget Committee concluded that in order to hold tax increases to 6%, it would be necessary to reduce planned expenditures by at least twelve million dollars. These revisions and cuts were deemed necessary to bring revenues and expenditures into line even though, at that time, the Board still anticipated a 7% increase in Provincial grants for 1992.

23. At this point, the Budget Committee had not yet begun to focus on salaries. It was looking for cut-backs in other areas of expenditure. From Ms. Cunningham's perspective, the projected 4.5% "allowable" increase had begun to look increasingly problematic in light of the Board's escalating financial concerns; however, her view represented a minority on the Salary

Committee. The majority of the Salary Committee was not inclined, at that stage, to review its negotiating “mandate” or return to the full Board for further instructions.

24. On October 24, 1991, Keith Riley, the Board’s Director of Education, wrote to his superintendents and principals to emphasize the developing budget problems and solicit their support for economic restraint. His letter begins:

In the current economy, Boards in the Province, are entering an increasingly difficult fiscal environment. As you are aware, we are witnessing national and local economic problems that will have significant implications with respect to our traditional manner of delivering program and services to our educational community.

My purpose in writing to you at this time is to bring you up to date on some recent Provincial and local activities on this subject and to solicit system-wide co-operation to develop a process to help resolve our current and future fiscal difficulties.

Developments at the provincial level were having an impact in Hamilton and compounding the local financial difficulties.

25. Mr. Riley pointed out that on October 1 the Treasurer of Ontario had announced a “mid-year spending adjustment plan”. The Treasurer had observed that the Province was facing a substantial revenue shortfall, and that there was going to be a “rigorous and comprehensive, policy and program expenditure review” designed to “realize cost savings”. On October 15, the Minister of Education advised the Chairs of the Provincial Boards of Education that the Government remained committed to the “reform” of education finance; however, there would have to be more “cost effective” ways of allocating resources. On October 17, 1991 an Assistant Deputy Minister advised, less ambiguously, that restraint at all levels was critical and that Government support in the future might be limited to 3-4% per annum. As Premier Rae had put it in a speech in June 1991 (which Mr. Riley also quoted): “... The party is over. There is no more gravy...”.

26. These messages from Provincial officials were consistently pessimistic, and, one presumes, that they were intended to temper expectations, and pave the way for serious restraint. The announcements reinforced the concerns the Board was already addressing. In his letter to his subordinates, Mr. Riley summarized the situation this way:

Earlier this year, Senior Management presented the 1992 Proforma Budget to the Board. This document was a projection of expenditures and revenues based upon our 1991 operations, historical trends, an inflation factor and management assumptions of future events. That budget portrayed an expenditure increase of \$24 million for a total of \$290 million resulting in an increase to the average taxpayer of 13.8%. After due consideration, the Board adopted a resolution that the budget be amended to reflect a target increase of 6% to the average taxpayer. The initial implication of this resolution means that we must begin a process to reduce our preliminary estimates for 1992 by \$12 million.

In response to the initiatives at the provincial and local levels, I am soliciting, through your respective Superintendents, your co-operation in addressing our fiscal challenges for 1991 and 1992.

Effective immediately, I am asking for your support for a Voluntary Restraint Program. Wherever possible, it will be to our mutual advantage to curtail as many expenditures as possible to December 31. These savings should produce a surplus which can be applied to the proposed \$12 million operating reduction in 1992.

The process was to begin immediately.

27. This is the position in which the “new” Board found itself by December 1991. We say

“new” because, as we have already noted, there was an election in mid-November 1991 which resulted in the return of five new members. According to Bob Stewart, it was a difficult time for the incumbent trustees, who had to campaign and conduct Board business at the same time.

28. Despite the worsening economic situation and the impending election, the Board’s negotiators continued to bargain with the teachers’ groups within the framework of the 4.5% “mandate” which had been set earlier that year. Indeed, although the Board was anxious to negotiate salary increases of less than 4.5%, a Provincially-appointed fact-finder recommended somewhat greater salary increases for secondary school teachers. Once that fact finder’s report was made public, it was not at all clear that teacher salary increases could be kept below 4.5%, for if the Board pressed a position less generous than the fact-finder’s recommendation, there could well be a strike with one or more of the teachers’ unions. And that would effectively shut down the local school system. The Board’s desire for economic restraint, was being challenged by the realities of bargaining power.

29. The details of the teachers’ negotiations need not be reviewed here. We need only note that the teachers’ unions had both the numbers and the bargaining power to vigorously press their claims, and by early December, tentative settlements had been reached with the main teacher groups (elementary, secondary and Francophone). But like the later OPEIU settlement, these tentative settlements were made subject to ratification by the new Board, and its members were not at all convinced that ratification was appropriate. According to Mr. Stewart who was closely involved in the secondary school negotiations with OSSTF, he “took a lot of flack” for the OSSTF settlement because it involved increases beyond what a number of trustees thought the Board could afford to pay. Nevertheless, the OSSTF/AEFO settlement was ratified by the trustees in mid-December 1991.

30. Shortly after the OSSTF tentative settlement, the Board’s negotiators concluded a similar settlement with the elementary school teachers. Like the earlier OSSTF agreement, the elementary package envisaged increases of about 4½% in the first year and 3.6% in the second year of the agreement’s operation. The elementary settlement was scheduled to come before the Board for ratification on January 16, 1992.

31. Meanwhile, since the teachers’ collective bargaining pattern had now emerged, the Board returned to the bargaining table with the OPEIU. The parties’ representatives met on January 16 and concluded a Memorandum of Settlement that provided for a 4.3% increase in the first year of the agreement’s operation, and a 3.6% increase in the second year. Mr. Stewart signed on behalf of the Salary Committee, which undertook to recommend ratification to the full Board. The Memorandum of Settlement reads, in part, as follows:

1. The parties agree that the terms of this Memorandum shall constitute full settlement of all matters in dispute.
2. The undersigned representatives agree to recommend acceptance of this Memorandum of Agreement to their respective principals.

The “principals” referred to in paragraph 2, are the union membership and the full board, both of which had to vote their approval of the proposed settlement.

32. Ms. Cooke testified that the parties were pleased to have concluded their negotiations, but the final meeting was somewhat rushed. Debbie Russon was quite anxious to have the document finalized that day and urged Ms. Cooke to stay late if necessary. Ms. Russon told Ms. Cooke that she did not want to postpone execution of the document until after “Bob Rae’s speech” - by which Ms. Russon meant an address by the Premier which was expected within a few days and was

widely rumoured to contain more bad news. Mr. Stewart was called in, on short notice, to execute the Memorandum on behalf of the Salary Committee.

33. Mr. Stewart was also anxious to get the OPEIU settlement concluded on January 16, so that the matter could be put before the Board as quickly as possible. He too mentioned the Premier's speech, and asked Ms. Cooke how long it would take for the OPEIU members to ratify the settlement. He urged Ms. Cooke to do what she could to expedite the process and, like Ms. Russon, suggested that it was desirable to have the "deal cleaned up" before Premier Rae's address. Ms. Cooke replied that the ratification process could not be completed for several weeks.

34. Ms. Cooke understood from the comments of Mr. Stewart and Ms. Russon that if they did not finalize the settlement that day, but rather waited until after the speech, there might be changes proposed. She conceded that by January 16 she knew that the Premier's remarks might produce collective bargaining difficulties. However, she did not think that the OPEIU settlement could be affected nor was she aware of any controversy about the elementary teachers' settlement which was to be considered by the Board that evening. In her mind, once the Board's negotiators concluded a settlement and undertook to recommend ratification, there would be no changes proposed, even if the Premier's speech did contain more bad news.

35. Ms. Cooke testified that, in her experience, the Board has routinely ratified any settlement recommended by the Salary Committee. In her view, ratification by the trustees was "a mere formality" or a "rubber stamp" which had always occurred in the past. Once the teachers had settled, the OPEIU tagged along, and the concurrence of the full Board was pro-forma - a foregone conclusion. Ms. Cooke testified that she did not then realize that the teachers' settlement itself was being questioned.

36. That evening, the Board considered the elementary school teachers' settlement which was in the same range as the earlier (OSSTF) teacher settlement. As before, the Salary Committee recommended ratification. This time, though, the full Board balked.

37. Mr. Stewart and Ms. Cunningham both described an acrimonious meeting in which the trustees were seriously divided. Some, like Mr. Stewart, urged ratification because the settlement followed the OSSTF pattern, the contents of the Premier's announcement were still speculative (although no one expected good news) and the rejection of the elementary settlement would likely lead to a strike, involving 1,600 teachers and 30,000 students. Other trustees either wanted to delay consideration of the settlement until after the Premier's announcement (which was expected in a few days), or felt that the settlement was simply "too rich" given the Board's developing financial problems. But no one wanted a strike.

38. A motion to reject ratification of the elementary teachers' settlement was "lost" on a tie vote. Efforts to postpone consideration were likewise defeated. The Board was deadlocked, and the debate became so heated that it was considered desirable to call a recess. Finally, after the recess, the elementary settlement was considered again and this time it narrowly passed - with seven of the nineteen trustees abstaining. It is evident that the elementary settlement did not enjoy the support of a majority of the trustees, but neither were they prepared to risk the political and collective bargaining consequences of rejecting it.

39. The text of the Premier's speech was released five days later, on January 21, 1993. Its contents were gloomy, but the message was clear. The broad public sector was going to face severe Provincial constraints. The Province was going to significantly reduce the funding of public agencies. Those agencies could now expect only a 1% increase in grants for 1992, with perhaps a further

2% in each of the following years. The hints and warnings of the previous few months were now a harsh reality.

40. For the Hamilton Board of Education, the announced reduction in Provincial grants was a change from the projected 7% increase to an increase of a mere 1%. This represented a reduction in funding of about \$7,000,000, which, on then current projections, would result in an overall budget deficit of approximately \$20,000,000 (i.e. \$7,000,000 in addition to the approximately \$12,000,000 deficit which had been projected a couple of months before). And there were only seven weeks left to get the Board's revised budget to the City of Hamilton. Since the Board had already had real difficulties identifying where \$12,000,000 could be cut from its expenditure commitments, it was not at all apparent where these further millions could be found, nor how the Board could avoid a massive tax increase.

41. Mr. Stewart had been in favour of ratifying the teachers' settlements, which he thought were reasonable in relation to those concluded at other school boards. He thought ratification was necessary if a strike was to be averted. Ms. Cunningham had been much more cautious. She had long been concerned about the ongoing financial impact on so large a component of the Board's operating budget. But both testified that the reduction in Provincial grants greatly exacerbated the Board's financial difficulties, and precipitated problems of unprecedented proportion. It was too early to determine the precise ramifications of the reduction in Provincial support, but it was evident that there would have to be severe retrenchment.

42. These issues were debated at a Board meeting on January 23, where the trustees sought to establish priorities and identify the constituencies that would have to be involved in the proposed austerity program. Each of the Board's sub-committees was asked to consider how restraint would affect its area of concern, since it appeared that there would have to be program cuts and, perhaps, lay-offs. Mr. Stewart concluded, for example, that the negotiating "mandate" would have to be reduced to 1%, for all bargaining groups that had not yet settled. It was also resolved to meet with the Board's senior officials, and all of its trade unions to explore alternatives. According to Ms. Cunningham, it was a period of great stress.

43. As part of the consultation process, all of the unions were advised of the Board's financial difficulties and invited to assist in their resolution. Ms. Cunningham was hopeful that the teachers' federations with which the Board had recently settled, would be prepared to review those settlements and make concessions - for example, by taking some of their "professional development days" without pay. However, the teachers' federations were not prepared to consider such alternatives. From their perspective, it was the employer's problem to find the money to finance the settlements it had so recently ratified. As far as the teachers were concerned, once the Board had ratified, they had an agreement, and they proposed to hold the employer to it.

44. Information about the Board's problems was also directed to OPEIU, and there was a meeting in which OPEIU was represented - although this was not a collective bargaining meeting. Accordingly, while OPEIU might not have foreseen that its settlement was in jeopardy, it would have been well aware of the Board's economic predicament. And, as we have already noted, on January 16, Ms. Russon and Mr. Stewart had both urged OPEIU to conclude negotiations that day and, ratify as soon as possible, because they were worried about the potential impact of the Premier's announcement.

45. There was also an informal indication that the OPEIU settlement might be in trouble.

46. The OPEIU settlement was ratified by the union membership on January 30. Shortly thereafter, Ms. Cooke had a conversation with Ms. Russon in which Ms. Cooke asked when the

matter would be considered by the Board. Ms. Russon indicated that there might be difficulty getting ratification - although she did not elaborate nor discuss how close the elementary settlement had come to rejection. Ms. Cooke replied that if that happened, the union would have to consider its options.

47. The doubts expressed by Ms. Russon were consistent with the concerns that she and Mr. Stewart had expressed earlier; and against that background, it is a little difficult to see why Ms. Cooke would be so surprised when the Premier's announcement had the predicted (and perhaps intended) effect. The fact is, whatever Ms. Cooke's experience may have been, there was no guarantee that the newly-elected Board would cede its political authority and simply "rubber stamp" the recommendation of its subcommittee - any more than there was a guarantee that the union membership would ratify the settlement proposed by union officials. Nor is it surprising that when exercising the prerogative reserved to it by the terms of the Memorandum, the Board would consider all of the relevant circumstances, including the Board's financial difficulties and the impact of the Premier's recent announcement.

48. On February 13 the Salary Committee met to consider the OPEIU Memorandum of Agreement which had been ratified by the union on January 30. The Committee members debated whether to return to the bargaining table in view of the Premier's speech and the economic impact on the Board. Ultimately, the Salary Committee agreed, by a majority vote, to honour its undertaking and recommend ratification - although it was by no means clear that the full Board would ratify in view of the problems with the elementary settlement and the funding cuts announced in the Premier's speech.

49. The OPEIU settlement came before the full Board on February 20. As promised, the Salary Committee recommended ratification. In fact, Mr. Stewart spoke strongly in favour of ratification (as he had promised to do), pointing out that the OPEIU Memorandum had been signed prior to the Premier's speech, and the bargaining unit consisted of a small group of women at the lower end of the pay scale. In his submission, a failure to ratify could be construed as "beating up on the little guy" regardless of the Board's financial crisis.

50. Other trustees were concerned about the bleak financial picture, and those who were troubled by the ratification of the elementary teachers' settlement were even more concerned, now that their fears had been realized. It was not at all clear how the Board could cope with the anticipated \$20,000,000 deficit and the trustees found themselves on the horns of an ethical dilemma. They did not want to appear to be giving preferential treatment to teachers or discriminating against their lower-paid female employees, but, by the same token, they did not consider it appropriate to extend the teachers' settlement pattern now that the financial parameters had changed. The Board was engaged in ongoing collective bargaining with other employee groups whom the trustees feared would take "the wrong message" from ratification of a 4.5% plus 3.6% settlement when the Premier was calling for restraint and limiting grant increases to 1 and 2%. The trustees too were concerned about the "pattern" - although from a very different perspective than OPEIU. Ironically, having elected to let the teachers' collective bargaining objectives dictate its own goals, OPEIU found itself in difficulty when the trustees concluded that the teachers' settlements were not affordable and should not be perpetuated. Nor was it particularly helpful from OPEIU's perspective that the teachers were unwilling to consider concessions, because that simply meant that there was less bargaining room for the other unions.

51. The trustees voted not to ratify the settlement. The trustees voted to refer the matter back to the Salary Committee for further negotiation.

52. Following the meeting of February 20, Ms. Russon called Ms. Cooke to advise her what

had happened and to report that the trustees had referred the settlement back for further negotiations. Both parties seem to have contemplated the *possibility* of further bargaining, but neither of them took any steps to initiate further meetings. Ms. Cooke testified that the union did not foreclose such negotiations but, after consulting the membership, she concluded that any offer less than the settlement would be unacceptable and would require the union to apply for conciliation (the first step on a path that could lead to a strike). The CUPE bargaining unit was, by that time, facing similar choices and eventually did decide to go on strike. However, OPEIU did not want to do that, so it decided first to threaten, and later to launch, this unfair labour practice proceeding.

53. In the weeks immediately following the rejection of the OPEIU settlement, the Board continued to struggle with its budgetary problems and the anticipated effect of the Premier's announced cut-backs. The Board knew that the consequences would be significant, but it still did not know precisely what they were. According to Ms. Cunningham, the Ministry of Education's "arithmetic" does not always accord with that of the Board; moreover, the deepening economic problems in the local community seemed to warrant reclassification as a "less affluent Board". That, in turn, could mean access to remedial funding arrangements that might modify the impact of the Premier's announcement. It was a period of considerable uncertainty and anxiety.

54. The complaint was filed with the Board on April 7, 1992. It contains this request for relief:

The complainant seeks ... a declaration that the respondent was bound by the collective agreement as set out in the Memorandum of Agreement agreed on between the parties and dated January 16, 1992 [and] a mandatory order and direction that the respondent ratify, execute and enter into the collective agreement as set out in the Memorandum of Agreement agreed on between the parties and dated January 16, 1992.

As far as Ms. Cooke was concerned, they had a "deal" on January 16, and she was not prepared to consider anything else.

55. Once this complaint was filed, there were no further negotiations. In July, the Board wrote to the union indicating its desire to return to the bargaining table. Paragraph 33 of the Board's reply reads:

The respondent states it has verbally advised the union on a number of occasions of its willingness to continue negotiations and consider proposals which may conclude a collective agreement. The respondent states that the union was formally advised by letter dated July 3, 1992 that it was prepared to continue to negotiate a renewal of the collective agreement.

However, no bargaining took place. Both parties were apparently content to await this tribunal's decision on the unfair labour practice complaint. The Board's offer to return to the bargaining table elicited no response from OPEIU, which was proceeding with this complaint and taking the position that it "already had a deal".

### III

56. With this review of the evidence, we return to the legal issue before us: whether the Board has "failed to bargain in good faith and make every reasonable effort to make a collective agreement". In answering that question, we think it is useful to consider two separate time frames: the period preceding the Board's rejection of the proposed OPEIU settlement on February 20, 1993; and the period between February 20, 1993 and the filing of this complaint early in April.

\* \* \*

57. We might begin by observing that it is not uncommon for parties to conduct their bargaining in accordance with “pattern settlements” achieved elsewhere. But the Act does not require that they do so, nor is either party automatically obliged to accede to terms negotiated by another group of employees. Notionally at least, each bargaining unit is separate, and the parties are entitled to negotiate a separate collective agreement which reflects their particular interests and bargaining power. The “pattern” is simply part of the context, which includes (but may be overridden by) the particular features of the parties’ collective bargaining relationship. A strategically-placed group of employees may do quite a bit better than the perceived norm, while a group with less bargaining power may do less well.

58. As a practical matter, though, pattern bargaining is relatively common both between employers, and within the context of an employer’s own organization, because the bargaining achievements of others shape expectations, influence goals, and, within the employer’s own organization, effect what it is willing or able to pay. There may even be a tacit understanding, as there was here, that the deal struck by the “main players” would represent the outer limit for less significant groups or would substantially influence what they would obtain. In the instant case, the teachers’ settlements had been an important consideration in previous years, so it is not surprising that the Board and OPEIU were both content to suspend bargaining until the teachers’ pattern emerged.

59. There was, however, no *undertaking* to provide secretarial employees with salary increases identical to those granted to teachers, and that was not in fact what happened. It was recognized that OPEIU was obliged to negotiate its own settlement terms as it eventually did. The teachers’ pattern was significant, but not controlling; moreover, its influence appears to be rooted in notions of “equal treatment” rather than economic considerations, an assessment of the secretaries’ relative contribution to the organization, or a sober evaluation of their bargaining power. There is no functional relationship between the two groups which dictates that their salary increments should be the same, nor does the employer’s “ability to pay” raise the same practical (as opposed to tactical) considerations. The fact is, the two bargaining groups are quite different - with different skills, different training, different duties, different working conditions, different work pattern (vacations, etc.), different bargaining agents, and different governing collective bargaining legislation. There is no obvious reason why the OPEIU settlement should be equal to, or limited to, that reached with the Board’s teachers.

60. Nevertheless, the parties’ negotiators reached a tentative agreement on the basis of their shared assumption that the teachers’ settlement was significant. The question then becomes whether the employer was entitled to later reject that settlement when, in its opinion, the economic climate had changed.

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61. There are quite a few OLRB cases which deal with the issue of “resiling” from positions agreed upon before, but they do not provide an unequivocal answer. Sometimes a party has been able to withdraw from its previous position, and sometimes it has not, depending upon the reasons for the purported change of heart, and whether the Board could conclude that the earlier position was a sham, or the later one a device to avoid entering into a collective agreement. A change of position occasioned by the interplay of bargaining power or changing economic circumstances will not, in itself, be unlawful. (See: *The Grey Owen Sound Health Unit*, [1979] OLRB Rep. Aug. 751; *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136; *Canton East Fairest Township*, [1988] OLRB Rep. Sept. 866; *Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep.

June 507; *Saville Food Products Inc.*, [1986] OLRB Rep. Apr. 552; and *Spartan of Canada Ltd.*, [1985] OLRB Rep. Sept. 1420.) Each case turns on its own particular facts.

62. In the instant case, it is important to note that the January 16 settlement expressly contemplates that it will be subject to ratification. *Prima facie*, the terms of that settlement mean what they say. The deal is provisional; and, OPEIU seems to have taken it for granted that its members retained a veto, and were entitled to reject the settlement if, for some reason or other, they found it wanting. It seems to be acknowledged that that is a political process in which the OPEIU membership had a free hand to disregard the recommendation of their negotiating team. There is nothing to suggest that the Board ever gave up a reciprocal right to reject, and there was no representation from its negotiating committee to this effect. Obviously, the Board, too, is a “political body” with responsibilities to its electorate and its own view of the employer’s interests - especially in the wake of an election, and in light of the employer’s escalating economic difficulties.

63. The Board is not a private sector enterprise, where the authority of the negotiating agent may be much more closely fused with that of the “principal”. The relationship between the full Board and its sub-committee is different, and, quite frankly, whatever the past practice might have been, it was unwise for OPEIU to treat the full Board as a mere “rubber stamp”, or a pro-forma process of automatic approval - especially when, as early as January 16, the Board’s negotiators were worried about the shifting economic circumstances, and warned Ms. Cooke that the Premier’s speech would impact upon bargaining. We do not suggest that an elected body has an entirely free hand to resile from its agreements or float with the political winds; however, it is entitled to exercise its own judgement in accordance with the negotiated terms of settlement. There was no agreement to ratify, but merely an undertaking on the part of the employer’s representatives, to *recommend* ratification. Those parts of the settlement would be meaningless if it were not contemplated that the Board had an option to reject.

64. This is not a case in which there was a sudden, unexplained change of heart, nor was the Board’s decision to reopen bargaining just a matter of “politics” or shifting alliances among the Board’s members. The situation really was different in February from what it had been before; and that new reality was underlined by the Premier’s grim message of January 21, which confirmed and heightened concerns that were already emerging.

65. In our opinion, the circumstances faced by the Board on February 20 had shifted sufficiently and generated sufficient economic uncertainty, to warrant reconsideration of the Board’s earlier collective bargaining stance, without breaching its statutory obligation to “bargain in good faith and make every reasonable effort to make a collective agreement”. There was no failure to recognize or intent to undermine the union (as there was, for example, in *Wilson Automotive*). Nor was the Board’s decision a pretence or subterfuge. It did not seize on the Premier’s speech as a device to avoid a collective agreement with OPEIU. The change in circumstances was real and compelling.

66. In the broader public sector, the Provincial Government funding agency is always a “ghost at the bargaining table” which influences, to a greater or lesser degree, what subordinate bodies are willing or able to pay (see for example: *St. Joseph’s Hospital*, 76 CLLC ¶16,026). But in this case, the “ghost” had rattled its chains and begun to speak. And the message was clear: the earlier warnings were warranted, the economic situation was serious, and the Province intended to impose severe financial restraints upon itself and its dependencies. Agencies receiving transfer payments were expected to do the same; and in light of the Board’s existing financial woes, we find that it was entitled to rethink its financial commitments, including those associated with collective bargaining.

67. We do not say that the Board was entitled to *refuse* to bargain. On the contrary. It was obliged to bargain with the union, *inter alia*, about the new economic parameters, and inform itself about those matters so it could bargain meaningfully. (See: *C.I.L.* [1976] OLRB Rep. May 199). But it was also entitled to reconsider its previous bargaining position, and assess whether, given the change in funding, the teachers' bargaining pattern should be extended to the rest of its employees - including those represented by OPEIU.

68. There was no breach of section 15 in the period to and including February 20, 1991.

69. The problem in the period after February 20, 1991, is that the Board did not bargain at all, and neither did the OPEIU. Were it not for OPEIU's inaction, and its decision to rely upon litigation rather than negotiation, we might well have concluded that the Board had breached its statutory duty by failing to return to the bargaining table. The Board may not have been obliged to follow the teachers' pattern, or its own earlier bargaining position, but it was required to address OPEIU's concerns, on their merits. And having rejected a settlement which its negotiators had concluded and recommended, the Board was required to explain why OPEIU's bargaining objectives could not be accommodated within the revised budget.

70. For the fact is, OPEIU has some good arguments to make, quite apart from the teachers' settlement or the Board's economic woes.

71. OPEIU represents a relatively small group of relatively lower-paid female employees who deserve the Board's consideration on that basis alone; moreover, the actual cost of the OPEIU settlement that the Board rejected - some \$84,000 - is a minuscule part of its total budget (about 3 one-hundreds of 1%). In relation to the twenty million dollar deficit about which the Board was concerned in the relevant period, the proposed OPEIU settlement would represent less than one half of 1%. The financial impact on the Board's operation is negligible, and since the teachers' pattern or percentages cannot (so it says) now be the measure of comparison, its economic rationale must be based on the *actual cost*, of *this settlement*, in relation to the cost of other things upon which it spends money. Even the Premier's speech contemplates restrictions on overall expenditure, not restrictions on wages per se, and certainly not limits on the wages of lower paid workers, while continuing to spend on other items.

72. To put the matter another way: since the Board was concerned about the tax burden for the Hamilton taxpayer, the evidence before us is that the OPEIU settlement would cost that taxpayer about 42¢ a year, and for the workers involved, would generate a wage increase of about \$18.00 per year - not a princely sum, as Mr. Stewart pointed out in his evidence. If the issue is one of cost, not pattern or percentages, OPEIU can also remind the trustees (and the citizens who elected them) that, for all their talk of restraint, and concern about extending the teachers' pattern, the trustees nevertheless proceeded with their own planned salary increase of 4.3%, which is the amount they maintain cannot feasibly be given to their secretaries. OPEIU argues that it is sheer hypocrisy for politicians to urge restraint while exhibiting none when their own personal interests are at stake. And having reviewed the Board's financial statements - particularly now that the grant situation has been clarified - there appears to be much more room to bargain than might have been thought in the crisis weeks immediately after February 20.

73. However, the place to raise these arguments is at the bargaining table or in the public forum.

74. No doubt, the Board would not have been legally required to settle at 4.3%, or at any other amount; nor is this tribunal entitled to dictate what the appropriate settlement would be. In the system of collective bargaining as currently structured, the Labour Relations Board does not

dictate wages, and either party is entitled to mix reason with power in pursuit of its own bargaining objectives - as the teachers' federations quite clearly did. The threatened strike or lock-out (or the ability to sustain one) are an important catalyst for compromise which cannot be ignored, and clearly were not ignored by the trustees when they reluctantly ratified the elementary settlement. (See generally *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356 at para. 30-34; and *Sumner Press Ltd.*, [1991] OLRB Rep. Oct. 1207 at paras. 5-8.) Persuasion and power are both elements of the bargaining equation which may or may not produce a result that an outsider would consider "fair".

75. The problem, though, is that the Board has not had the opportunity to make those choices or weigh those risks. Its offer to return to the bargaining table was rejected, and was met with the assertion, through these proceedings, that the parties already had an agreement which was legally binding and from which the Board could not deviate. Both parties were content to suspend bargaining pending the resolution of this litigation. Both parties were content to await this tribunal's decision about whether they had an agreement. And neither pressed the Labour Relations Board to proceed on a peremptory basis.

76. Accordingly, while the mutual duty to bargain continued past February 20, 1992, we cannot conclude that the Board breached its duty to bargain in the period between February 20, 1992 and the filing of this complaint; and we are unable to assess the quality of bargaining thereafter because none occurred. Thus, even if we were disposed to consider the parties' behaviour after the complaint was filed, we would not conclude that there has been any statutory violation. Or if there has, it is a mutual one for which no remedy would flow, other than a direction to return to the bargaining table and comply with section 15 of the Act.

77. For the foregoing reasons, this complaint is dismissed; however, as noted, the parties must now go back to the bargaining table and bargain in good faith as they are required to do by law.

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**3256-91-G; 3540-91-G** International Union of Operating Engineers and it's Local 793, Applicant v. **E. S. Fox Limited**, Responding Party; Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007, Applicant v. **E. S. Fox Limited**, Responding Party

**Construction Industry - Construction Industry Grievance - Work by millwrights on barge found not to be construction work covered by Millwrights' union collective agreement - Operating Engineers' province wide agreement held not restricted in its application to construction industry and applying to work on barge - Millwrights' grievance dismissed and Operating Engineers' grievance allowed**

**BEFORE:** *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *B. L. Armstrong*.

**APPEARANCES:** *Bernard Fishbein*, *Joseph Kennedy* and *James Anderson* for the International Union of Operating Engineers and it's Local 793; *J. David Watson* and *Ron Coltart* for the Millwright District Council of Ontario on its own behalf and on behalf of its Local 1007; *W. J. McNaughton* and *H. Miron* for the responding party.

**DECISION OF LOUISA M. DAVIE, VICE-CHAIR, AND BOARD MEMBER B. L. ARMSTRONG; April 21, 1993**

1. The applicant in each of these two applications has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination pursuant to section 126 (formerly section 124) of the *Labour Relations Act* ("the Act"). Each grievance arises out of work performed by employees of the responding party ("E. S. Fox" or "the employer"). The employer's defence to each of these grievances is that the work it performed was not covered by any collective agreement to which it is bound with either the applicant International Union of Operating Engineers, Local 793 ("Local 793" or the "O.E.") or the applicant the Millwright District Council of Ontario ("Millwrights").

FACTS

2. E. S. Fox is primarily a mechanical engineering firm. It operates a number of different "divisions". These divisions are not separate corporate entities. As a result of its methods of operation E. S. Fox is bound to a number of different collective agreements. Thus, for example, E. S. Fox operates a "fabricating division" at Niagara Falls. Employees at that location are covered by a collective agreement which E. S. Fox has with the United Steelworkers of America ("Steelworkers").

3. E. S. Fox also operates a "construction division". The work generally performed by that division can best be described as work of a steel erection or mechanical engineering nature. E. S. Fox is a member of the Association of Millwrighting Contractors of Ontario Inc., ("AMCO") a designated employer bargaining agency ("EBA") and is bound to both the province-wide agreement between that EBA and the Millwright District Council of Ontario ("the Millwrights Provincial (ICI) Agreement") and another collective agreement between those same two entities entitled "Agreement for Maintenance and Occupied Premises Projects" ("the Millwrights Maintenance Agreement"). E. S. Fox is also a member of the Ontario Erectors Association, Incorporated (OEA) and is thus bound to the provincial collective agreement between the O.E. employer bargaining agency and the O.E. employee bargaining agency (the O.E. province-wide agreement) to which the OEA is a signatory. In this proceeding E. S. Fox takes the position that these various agreements only apply to employees of its "construction" division.

4. E. S. Fox also operates a pipe fabrication division known as the Port Robinson Pipe Fabrication Facility. Employees at that location are covered by the national standard agreement for a commercial pipe fabrication shop to which E. S. Fox is bound. That agreement is between the Canadian Pipe Fabricators Association and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the U.A.") and will be referred to as the U.A. Pipe Shop Agreement.

5. The work which gives rise to these grievances was performed on a barge which was floating on water in a branch of the Welland Canal. That branch of water is physically located adjacent to the Port Robinson Pipe Fabrication Shop property.

6. The work was not however performed by E. S. Fox's Pipe Fabrication Division pursuant to the U.A. Pipe Shop Agreement. Rather the work was performed by E. S. Fox's "Marine Division" pursuant to the terms of a separate collective agreement entitled a "Marine Agreement" between E. S. Fox and the U.A. Local 666. There was some dispute amongst the parties concerning the status and/or validity of that agreement but, in the circumstances of this case that dispute is not relevant to the determination of these grievances.

7. There was no dispute about the work which gives rise to these grievances. The work involved a conversion of a large barge. E. S. Fox obtained a contract from St. Mary's Cement to convert or refit a barge several hundred feet long to a self-unloading barge. The specific work involved raising the deck of the hold of the barge, and the installation of a conveyor system to enable cargo to be taken from the hold of the barge to deck level. A further conveyor system (described by counsel for the employer as a long boom conveyor system) was built to swing the cargo over the deck and onto the dock adjacent to the barge. Upon completion of the barge its owner, St. Mary's Cement, would use the barge for service on the Great Lakes.

8. As indicated the work on the barge was undertaken while the barge was floating on water in a branch of the Welland Canal. At the time the work was undertaken the barge was moored to the dock by means of cables and nylon ropes. A four foot wide walkway led from the shore into an access port cut approximately ten to fifteen feet above the water line on the barge. The walkway was welded onto the barge. The purpose of the mooring lines and cables was to secure the barge so that it would not move while the refitting work was undertaken.

9. In order to perform the work E. S. Fox used a large crane to lift steel, equipment and materials onto the barge. In addition, one or two smaller cranes were used on the ship itself to move material. There is no dispute that the operation of those cranes is the same type of work typically done by members of the O.E. on E. S. Fox's construction division projects.

10. The installation and alignment of the conveyor system and self-unloading equipment was performed by persons referred to as "shipwrights". There is no dispute that the type of work performed by the shipwright is the same type of work typically done by members of the Millwrights on the employer's construction division projects.

11. All of the employees at the project worked under the Marine Agreement which E. S. Fox has with the U.A. Local 666. The Millwrights generally assert the work of the shipwrights should have been performed in accordance with either the Millwrights Provincial (ICI) Agreement or the Millwrights Maintenance Agreement. Local 793 asserts the operation of equipment and cranes should have been performed in accordance with the O.E. province-wide agreement. E. S. Fox disputes these assertions.

12. The evidence also discloses the following facts.

13. In or about 1988 E. S. Fox fabricated a vessel or tank which was part of a desalinization plant. That vessel was put on a barge for transportation to the customer. The vessel was contained within a frame and welded onto the barge for transportation. In addition a number of alterations were made to the barge itself, including the installation of handrails, catwalks etc. A member of Local 793 operated a 25 ton grove crane to lift material onto the barge while work was being done on the vessel on the barge. That Local 793 member worked on this E. S. Fox project for approximately four to five months and was paid pursuant to Schedule "B" of the O.E. province-wide agreement.

14. In the past E. S. Fox has done work on ships using millwrights from the union. On those occasions the unionized millwrights performing the work were paid in accordance with the Millwrights' provincial (ICI) agreement. Thus in 1978-1979 E. S. Fox's fabricating division at Niagara Falls built two "shunters" (both used to push/pull ships through the locks). From time to time during the course of the building of these shunters, E. S. Fox used unionized millwrights (who were regularly employed by E. S. Fox) to do such millwrighting work as the alignment of the engines. After such millwrighting work had been completed the fabricating division continued to build the shunters around the work that had been installed by the millwrights. When the fabricat-

ing division had built as much of the shunters as it could in the Niagara Falls shop, the shunters were transported to the McCreary docks. There the shunters were put on blocks about ten feet off the ground. E. S. Fox employed the same group of millwrights to install the propellers, drive shafts etc. before the shunters were launched in the water. The final alignment done by the millwrights was done when the shunters were in the water.

15. E. S. Fox employed between five and twelve millwrights from the union hall to do these various millwrighting jobs. The millwrights required came from E. S. Fox's construction division. After they had completed their work on the shunters these unionized millwrights went back to whatever else E. S. Fox's construction division had on-going at the time.

16. As E. S. Fox did not have large enough cranes to move the shunters it engaged both Sarnia Crane Rental and Nadrofsky Steel Erecting Limited for that purpose. Both of these companies are unionized contractors who have a collective bargaining relationship with Local 793. The crane operators employed on the shunter project were therefore members of Local 793 employed in accordance with the O.E. province-wide agreement.

17. In the winter of 1988 E. S. Fox performed work on two ships in the Kingston area. At that time it employed between two to four millwrights from the local union hall to work on a tour boat called "Island Queen" and a coast guard buoy tender called "Spune". The Island Queen was in dry dock while the Spune was moored in the water alongside a dock.

18. On these ships the millwright work involved changing drive shafts, work on the propellers, bushings, bearings, the installation of pumps and miscellaneous mechanical equipment. These two projects were winter projects performed by E. S. Fox millwrights. The work took approximately six to seven weeks as millwrights were sent by E. S. Fox for one or two days at a time to do the work when those millwrights were not needed elsewhere. When not working on the ships the millwrights performed their other "normal" work for E. S. Fox. At all times the millwrights were paid the appropriate millwrights provincial (ICI) agreement rates. There was no hoisting or crane work associated with E. S. Fox's work on these ships.

19. Other evidence which was placed before this panel with the agreement of the parties consisted of the operations at certain ship repair companies. Thus, the parties agreed that Port Weller Dry Docks, Fraser Ship Repair, and Marsh Engineering are three ship repair companies who could have done the work performed by E. S. Fox. Each of these ship repair companies has an "industrial" type collective agreement with either the Boilermakers or the Steelworkers. None of these companies have agreements with either the Millwrights or Local 793. The industrial type collective agreements at these three ship repair companies consist of a typical, single "wall to wall" bargaining unit which includes within it all employees regardless of their job functions.

20. The parties agreed that each of these three companies may from time to time contract out certain work thereby involving outside contractors who may in turn have collective agreements with either or both the Millwrights and Local 793. In those instances the outside contractors may come to these three ship repair companies bringing with them their "construction" or "craft" workers. As a result members of both the Millwrights and the Operating Engineers have worked at these three facilities from time to time.

21. In addition, and as permitted by article 2.02 of the collective agreement between E. S. Fox and the Steelworkers, members of both Millwrights and the Operating Engineers may from time to time perform work at the Niagara Falls Fabricating Division. When employed at the Fabricating Division members of each of these two trades do what is normally recognized as their craft work, that is to say the millwrighting or operating engineers' work that they would normally per-

form while employed with the construction division of E. S. Fox. When working at the Niagara facility these persons have always been paid the rate which they would normally receive under the Millwrights' provincial (ICI) agreement or Local 793's province-wide agreement if they were working on a construction division project.

22. The final area of evidence before us relates to the application of the O.E. province-wide agreement. That evidence came principally from Mr. J. Kennedy who was business representative of Local 793 from 1964 to 1974, and business manager of Local 793 from 1974 to 1992. Mr. Kennedy was involved in the negotiation of every collective agreement since the introduction of province-wide bargaining in 1978.

23. Mr. Kennedy testified that even before the introduction of legislated province-wide bargaining in the ICI sector, Local 793's practice and experience was to negotiate collective agreements which had province-wide application with the various employer organizations and individual contractors. He stated that as a result of this experience when province-wide bargaining legislation was enacted, Local 793 merely incorporated the legislation into its existing scheme of bargaining. A meeting was held between representatives of Local 793 and the various contractors and employer organizations at which it was agreed and established that the newly enacted province-wide ICI bargaining scheme would be incorporated into a single province-wide agreement with various appendices. Mr. Kennedy testified that at that initial meeting it was "clearly understood" by all parties present that notwithstanding the introduction of the province-wide bargaining legislation, the recognition portion of the existing province-wide collective agreements would remain unchanged. Mr. Kennedy testified that the intent of the parties was that the new province-wide collective agreement with its various appendices would continue to cover all the work performed by all the contractors bound to the agreement in the same way that the individual predecessor province-wide agreements had done. It was therefore Mr. Kennedy's evidence that the current province-wide agreement also covers *all* of the work that a contractor bound to that collective agreement does with hoisting (cranes), earthmoving or excavation equipment.

24. Mr. Kennedy testified that the work covered by the agreement is not limited to ICI sector construction work, and indeed is not limited to construction work. He testified that those contractors bound to Schedule "B" of the province-wide agreement such as E. S. Fox (generally members of the OEA) are bound to apply Schedule "B" to *all* of the work they perform. As an example Mr. Kennedy referred to his personal experiences and those instances when he was paid in accordance with Schedule "B" (or its predecessor) while employed by an OEA member contractor such as Dominion Bridge for such work as moving "pots" at the Steel company in Hamilton, straightening trucks that had skidded off the road at a northern location uranium mine etc.

25. We also heard from various members of Local 793. These persons testified about their personal experiences with the application of the collective agreement to work they had performed on behalf of other contractors (not E. S. Fox) bound to Schedule "B" of the province-wide agreement. Local 793 members testified to experiences similar to those of Mr. Kennedy's including instances when they were paid in accordance with Schedule "B" for such work as loading steel onto trucks in a yard, unloading machinery from ships for Algoma etc. The totality of their evidence indicates that when employed by an employer bound to the province-wide agreement, these Local 793 members have always been paid in accordance with the collective agreement, including those occasions when they performed work that is without doubt *not* construction work. It would appear however that generally, that work was performed at times when the contractor was already at the site engaged in construction activities, or at times when the Local 793 member was "in between" construction jobs but nevertheless continued to be employed by the contractor bound to the O.E. province-wide agreement.

26. More specifically we heard the evidence of one Local 793 member employed by E. S. Fox about his personal experiences with the application of the province-wide agreement at about the time when work on the barge commenced. Mr. Holder testified that he has been employed by E. S. Fox as a crane operator for approximately twelve years. Throughout his employment he has always been paid in accordance with Schedule "B" of the province-wide agreement.

27. At around the time work on the barge commenced Mr. Holder was working at the Port Robinson Pipe Fabricating facility property. Initially, Mr. Holder was part of the crew that first assembled a rented 165 ton crane. That initial assembly took place just outside the pipe shop. Mr. Holder then spent approximately one and a half to two weeks operating the crane. During this period of operation he unloaded steel plates from a truck and placed them behind the pipe shop facility. It was Mr. Holder's evidence that these steel plates were "for the barge job". After unloading the steel Mr. Holder was involved in the dismantling of the crane (i.e. removal of the boom). He then "walked" the crane down to the dock where the barge was moored. There he was involved in re-assembling the crane. He continued to operate the crane at its new location for approximately two weeks loading and unloading material from the barge. Throughout this time Mr. Holder continued to be employed pursuant to the terms and conditions of the province-wide agreement including the rates of pay set out in Schedule "B".

28. A dispute arose about Mr. Holder's continued employment under the terms and conditions of the province-wide agreement and Schedule "B". Another operator was engaged by E. S. Fox to operate the 165 ton crane. Mr. Holder however continued to work at the barge site operating a 25 ton Grove crane for approximately one week. During this period of time he loaded scrap into scrap bins and unloaded and loaded material from or onto trucks. He continued to be paid in accordance with Schedule "B" of the province-wide agreement. Thereafter Mr. Holder was transferred to another project and left the barge site.

29. Based on all of the evidence each of the trade unions asserted the work performed by E. S. Fox was construction work and/or in any event was covered by their collective agreements. On the other hand, E. S. Fox asserts that the work is not construction work as it involves work on a chattel and not a fixture. E. S. Fox also argues that the work is not covered by any collective agreement to which it is bound with either Local 793 or the Millwrights.

30. Before we determine the issues raised by the parties to these grievances, we wish to make it clear that in the context of a referral of a grievance to arbitration under section 126 of the Act it is not always necessary to determine whether work is or is not "construction". Pursuant to section 126 of the Act the Board has jurisdiction to hear grievances arising out of a collective agreement between a construction industry trade union and a construction industry employer as defined in section 119 of the Act. (See *Babcock and Wilcox Canada Limited*, [1988] OLRB Rep. Dec. 1198; *The Electrical Power Systems Construction Association*, [1990] OLRB Rep. Oct. 1031).

31. In the circumstances of this case the issue as to whether this particular work is construction work arises because it is inextricably tied to the position of the parties that the work does or does not fall within the ambit of the collective agreements to which E. S. Fox is bound. The issue before us is the interpretation of those collective agreements. E. S. Fox submits that it is not bound to apply those collective agreements to work which it asserts is not covered by the collective agreements. As a result we have to decide whether this particular work falls within the ambit of those collective agreements. Given the respective positions of the parties, the adjudication of that issue involves a determination as to whether the agreements are confined solely to "construction" work.

The Submissions with respect to the Millwrights' Grievance

32. We note also that in the circumstances of this case the issues revolving around the respective positions of the parties that the work is or is not construction industry work might well have arisen in the context of a jurisdictional dispute regarding the assignment of the work to members of U.A. Local 666. An earlier decision of the Board (before a different panel) noted however that U.A. Local 666 had not expressed an intent to file a jurisdictional dispute and, in the circumstances denied U.A. Local 666 status to intervene in these grievances (see 1992 OLRB Rep. April 431).

33. The following are the relevant provisions of the Millwrights' provincial (ICI) agreement:

Article One

SCOPE OF AGREEMENT AND RECOGNITION

• • •

(c) This Agreement shall cover and be applicable to all Employers of Employees in the Industrial, Commercial and Institutional sector of the Construction Industry within the Province of Ontario.

We were also referred to the trade jurisdiction claimed by the Millwrights which forms part of that provincial agreement. We find it unnecessary to set out that lengthy claim to jurisdiction. Instead, we consider it sufficient to merely note that the Millwrights' claim jurisdiction *inter alia* with respect to the installation of conveyor systems of the type installed on the barge.

34. The following are the relevant provisions of the Millwrights' Maintenance Agreement:

Agreement for Maintenance and Occupied Premises Projects:

• • •

This Agreement recognizes the need to depart from the normal Building Construction traditional work practices and conditions, and therefore, the following special conditions concerning wages and travel allowances are to enable the members of the Association the opportunity to become more competitive in order to provide work opportunities to the members of the Council.

All Articles of the I.C.I. Collective Agreement which remain silent in this Agreement are hereby considered an integral part of this Agreement.

ARTICLE ONE - RECOGNITION:

The Association hereby recognizes the Council as the sole and exclusive Bargaining Agency for all Employees engaged in the performance of repair, replacement, maintenance and renovation.

The Council hereby recognizes the Association as the sole and exclusive Bargaining Agency for all Employers engaged in the performance of repair, replacement, maintenance and renovation.

• • •

ARTICLE THREE - SCOPE OF WORK:

- (a) This Agreement covers all work assigned by the Owner under a single purchase order to the Employer and performed by Millwrights covered by this Agreement. When these Employees work under the direction and control of the Owner's maintenance

department, then such work will be covered by this Agreement and shall not be limited under Definitions in Article Four below.

- (b) This Agreement does not cover other work performed by the Employer of a new construction nature, in which event said work shall be done in accordance with the existing I.C.I. Provincial Agreement between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America.

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#### ARTICLE FOUR - DEFINITIONS:

- (a) Maintenance shall be defined as any work performed of a renovation, replacement, repair or maintenance character within the limits of a plant property, or other locations related directly thereto.
- (b) The word 'repair' used within the terms of this Agreement and in accordance with maintenance, is work required to restore by replacement of parts of existing facilities to efficient operating condition.
- (c) The word 'renovation' used within the terms of this Agreement and in connection with maintenance, is work required to improve and/or restore by replacement or by revamping parts of existing facilities to efficient operating condition.
- (d) The term 'existing facilities' used within the terms of this Agreement is limited to a constructed unit already completed and shall not apply to any new unit to be constructed in the future, even though the new unit is constructed on the same property or premises.

• • •

35. Counsel for the Millwrights argued that the evidence disclosed that the barge was essentially an industrial platform immobilized and affixed to the dock. Further, the product installed on the barge (i.e. conveyors and loading and unloading systems) fell within the jurisdiction of the Millwrights. It was asserted that that installation was "construction" within the meaning of Article 1(c) of the provincial agreement. It was submitted that the fact that the barge could be moved from place to place was immaterial to the determination as to whether the work was construction work within the meaning of the collective agreement. In this regard counsel argued that theoretically any other ready-mix plant could also be moved from area to area by an owner if the owner was prepared to incur the time and expense of so doing.

36. Counsel for the Millwrights further submitted that the Board must determine the intent of the parties to the collective agreement on the basis of the entirety of the language used in the collective agreement. Therefore, the Board's jurisprudence with respect to the meaning of "construction industry" (and its distinction between work in connection with chattels or fixtures) was not determinative. Counsel stated that the Board could not simply decide whether the work falls within the definition of "construction industry" as used in the Act because there was no reason to assume the parties intended "construction industry" as used in Article 1(c) of the collective agreement to be synonymous with the jurisprudence of the Board which defines "construction industry" under the Act. It was further argued that the breadth of the jurisdiction claimed within the collective agreement by the Millwrights indicated that the parties didn't merely intend the collective agreement definition of "construction industry" to be restricted to the definition of "construction industry" found in the Act.

37. In the *Labour Relations Act* "construction industry" is defined as follows:

“construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site.

The Millwrights’ asserted that at best the Board’s jurisprudence interpreting and applying this definition could only be used as an aid to interpretation. That jurisprudence was not determinative. Other statutes dealing with the definition of “construction industry” were equally relevant.

38. Counsel argued that section 45(8)(3) of the *Labour Relations Act* permits the Board to “interpret and apply the requirements of human rights and other employment-related statutes ...” and for that reason the *Occupational Health and Safety Act* was an equally relevant aid to interpretation. We were therefore referred to the following provisions of the *Occupational Health and Safety Act*:

1.-(1) In this Act,

• • •

“construction” includes erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting, or concreting, the installation of any machinery or plant, and any work or undertaking in connection with a project but does not include any work or undertaking underground in a mine; (“construction”)

• • •

“project” means a construction project, whether public or private, including,

(a) the construction of a building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking lot, cofferdam, conduit, sewer, watermain, service connection, telegraph, telephone or electrical cable, pipe line, duct or well, or any combination thereof,

(b) the moving of a building or structure, and

• • •

(2) For the purposes of this Act and the regulations, a ship being manufactured or under repair shall be deemed to be a project.

• • •

Counsel submitting that these provisions of the *Occupational Health and Safety Act* indicated that ship building could be considered to be “construction”.

39. It was also argued that in any event the barge was a “structure” as that term is used in both the *Labour Relations Act* and the *Occupational Health and Safety Act*.

40. Finally, with respect to the provincial (ICI) agreement, counsel for the Millwrights submitted that both the inconsistency between the recognition and jurisdiction articles of that agreement, and the past practice evidence with respect to the application of that agreement gave rise to an ambiguity. Extrinsic evidence to resolve that ambiguity was therefore relevant and admissible. Counsel referred to *Nei/Ferranti Packard*, (1991) 22 L.A.C. (4th) 51 and *Hermes Electronics Ltd.*, (1990) 14 L.A.C. (4th) 289. In this case the past practice evidence, although not extensive supported the Millwrights’ position that the parties intended to apply, and in fact had applied the Millwrights’ provincial (ICI) agreement to millwrights employed by E. S. Fox when those millwrights were working on or upon ships.

41. As an alternative position, it was submitted by counsel for the Millwrights that the Maintenance Agreement covered the work. In this regard counsel stated that on its face, and having particular regard to article 3(b), the Maintenance Agreement captured all of the other types of work performed by a millwright contractor who was a member of the AMCO, if that work was not otherwise covered by the provincial (ICI) agreement. It was asserted that the two collective agreements must be read together and were intended by the parties to cover *all* of the work performed by millwrights. Thus if the work was not within the ambit of the provincial (ICI) agreement it was by definition covered by the Millwrights' Maintenance Agreement.

42. In response to these submissions counsel for E. S. Fox stated that the work was neither "construction" nor "maintenance". It was not work in connection with a fixture or real property. Rather it was work in connection with a chattel or personal property.

43. Counsel referred to the decisions of the Board in defining "construction industry" in which a distinction between chattels and fixtures has been made. (See *M.G. Burke Investments Limited*, Board File No. 0640-76-R, unreported decision dated February 28, 1971; *City of Toronto*, [1978] OLRB Rep. Dec. 1145; *Disney Display*, [1986] OLRB Rep. Feb. 236). Counsel submitted that the Board's jurisprudence indicates that work performed on chattels is not construction work. Only work performed upon or in connection with fixtures can be considered construction. It was stated that such a distinction was equally applicable in determining the scope of the Millwrights' provincial (ICI) agreement.

44. Counsel for E. S. Fox stated that the barge was a chattel and the work which forms the basis of the Millwrights' grievance was work in relation to a chattel. Counsel asserted that the essence of a chattel is that it is movable, personal property which is not free-hold. In addition, the barge was not a structure and the work upon the barge was therefore not work upon a structure because the essence of a structure is that it is affixed in some way to the land.

45. It was argued by counsel for the employer that the Millwrights' provincial (ICI) agreement covered only construction work within the ICI sector of the construction industry. Neither ship building nor ship repair or refitting of a ship is construction work in the ICI sector of the construction industry. In this regard we were referred to the Board's decision in *Port Weller Dry Docks*, [1991] OLRB Rep. Sept. 1090. There the Board found "... that the business of repairing or building ships in dry docks does not constitute a business in the construction industry".

46. Counsel further submitted that the claims to jurisdiction contained within the Millwrights' provincial (ICI) collective agreement applied only if a contractor was engaged in construction work in the ICI sector. As a result it is not necessary for the Board to consider the Millwrights' claim to jurisdiction in this instance.

47. In response to the Millwrights' position that the Maintenance Agreement applied counsel for the employer stated that the parties intent with respect to the application of that agreement was clear. It was a collective agreement designed to permit contractors employing millwrights to compete with the in-house maintenance crews of owners for "maintenance" work. Counsel disputed that the Maintenance Agreement covered all millwrights' work performed by the AMCO members which was not "construction" work.

48. Counsel referred to the Board's jurisprudence regarding the distinction between maintenance and construction. In particular, we were referred to *Levert and Associates Contracting Inc.*, [1989] OLRB Rep. June 630, and *Quinard Limited*, [1982] OLRB Rep. July 1054. It was submitted that in the present circumstances the wholesale changes made to the barge when it was converted to a self unloading barge could not be characterized as "maintenance". It was not work

done merely to keep the barge going. The work did not involve maintaining or patching what was already there.

#### The Submissions with Respect to the Grievance of the Operating Engineers

49. With respect to the application of the Operating Engineers' province-wide agreement counsel for Local 793 adopted (and counsel for the employer disputed) the submissions of the Millwrights that the work performed was construction work.

50. Counsel for the O.E. further submitted however that the issue as to whether or not the work was construction was largely irrelevant in the adjudication of Local 793's grievance. He asserted that both the language of the province-wide agreement and the *viva voce* testimony of the witnesses regarding the application of that agreement supported Local 793's position that its collective agreement was not limited to construction work.

51. For its part counsel for the employer acknowledged that the O.E. province-wide collective agreement covers more than just ICI construction work. It was his position however that the province-wide agreement covers only the construction activities of E. S. Fox. It does not cover the activities of E. S. Fox's Marine Division such as ship repair or ship refitting.

52. In order to comprehend the respective positions of the parties it is necessary to set out the provisions of the relatively complicated O.E. province-wide collective agreement. In so doing we note that although the parties ultimately disagreed about the *extent* of the application of the province-wide agreement, they agreed on a number of matters with respect to the application of that collective agreement. Thus, for example, each party referred to and adopted as correct the unreported decision of the Board in *Rumble Contracting Limited*, (Board File No. 1644-83-M unreported decision dated August 31, 1984). In that decision the Board stated:

...

4. The collective agreement before us is an exceedingly complicated one. It covers the whole of the province geographically. It also covers sectors in the construction industry other than the industrial, commercial and institutional sector and it deals with various classifications of employees working in various areas. It also deals with various types of employers. To understand the dispute between the parties one must examine the whole of the agreement in some detail. The agreement is divided into two parts: a master portion which sets out certain standard terms and conditions applicable to everyone covered by the agreement, and a collection of some 14 "Schedules" running alphabetically (excluding "I") from Schedule "A" to Schedule "O". These schedules in turn deal with specific types of employers, the conditions to be applied in various areas of the province and, in one instance, certain types of employees....

5. The typical format for a schedule is a page listing the schedule and setting out, "This Schedule shall cover and apply..." followed by several pages setting out wages and working conditions for employees covered by that schedule. *It would be wrong to think of these introductory words as preambles. They define the coverage of each of the specific schedules.* Because these "definitions" which introduce each schedule are at the root of the dispute between the parties, we shall quote from the various schedules in the collective agreement the "definitions" for each of the schedules...

[emphasis added]

Similarly the "definitions" of the schedule are at the root of the current dispute. These definitions currently read as follows:

SCHEDULE "A"

This Schedule shall cover and apply to Employees [sic] engaged in the CRANE AND EQUIPMENT RENTAL BUSINESS within the Province of Ontario.

SCHEDULE "B"

This Schedule shall cover and apply to Employers engaged in the STEEL ERECTION OR MECHANICAL INSTALLATIONS BUSINESS within the Province of Ontario.

SCHEDULE "C"

This Schedule shall cover and apply to Employers engaged in the FOUNDATION, PILING AND CAISSON BORING BUSINESS within the Province of Ontario.

SCHEDULE "D"

This Schedule shall cover and apply to Employers that are member Companies of the Toronto & District Excavators Association engaged in the EXCAVATING BUSINESS within the Province of Ontario.

SCHEDULE "E"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Counties of Essex and Kent.

SCHEDULE "F"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C", & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the County of Lambton.

SCHEDULE "G"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin.

SCHEDULE "H"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Regional Municipalities of Niagara, Haldimand, Norfolk, Hamilton, Wentworth and Waterloo, the Counties of Brant, Dufferin, Grey, Wellington and that portion of the Regional Municipality of Halton lying West of #25 Highway.

SCHEDULE "J"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within Metropolitan Toronto, the Regional Municipalities of Peel, York, Durham, the Counties of Simcoe, Muskoka, Victoria, Haliburton, Peterborough and that portion of Northumberland lying West of a line running North from Colborne to McCrackens Landing and that portion of the Regional Municipality of Halton lying East of #25 Highway.

SCHEDULE "K"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Regional Municipality of Ottawa-Carleton, the Counties of Prescott, Glengarry, Russell, Stormont, Dundas, Grenville, Leeds, Lanark, Renfrew, Frontenac, Lennox and Addington, Hastings, Prince Edward and that portion of the County of Northumberland lying East of a line running North from Colborne to McCrackens Landing.

SCHEDULE "L"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C", "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Districts of Sudbury, Manitouline Island, Parry Sound, Nipissing, Temiskaming, Cochrane and that portion of the District of Algoma lying East of a line running North from Blind River to the Southerly boundary of the District of Sudbury.

SCHEDULE "M"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the District of Algoma excluding that portion lying East of a line running North from Blind River to the Southern Boundary of the District of Sudbury.

SCHEDULE "N"

This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules "A", "B", "C" & "D" hereof and without limited the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Districts of Kenora, Kenora Patricia, Rainy River and Thunder Bay.

SCHEDULE "O"

This Schedule shall cover and apply to Employers engaged in SURVEY WORK within the Province of Ontario.

53. In *Rumble Contracting, supra*, the Board went on to note:

A perusal of these descriptions of the various schedules sheds some light on the scheme of the collective agreement. Schedules "A", "B", "C" and "D" *refer to certain types of employers*. Schedules "E" through "N" deal with various specific areas of the province, and taken together, cover the totality of the Province of Ontario. And Schedule "O" deals with a specific kind of employee, namely, one engaged in survey work.

[emphasis added]

54. For the sake of completeness we note also the following provisions of the province-wide collective agreement which may be relevant to this referral of a grievance:

## COLLECTIVE AGREEMENT

BETWEEN:

OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY  
hereinafter called the "Employer"

- and -

OPERATING ENGINEERS EMPLOYEE BARGAINING AGENCY  
hereinafter called the "Union"

WHEREAS the Union and the Employer are desirous of establishing a form of standard collective agreement with respect to employees of Employers engaged in the construction industry and equipment rental within the Province of Ontario, to provide uniform interpretation, application and administration of the relationship established.

IT IS EXPRESSLY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:-

...

## ARTICLE 2 - RECOGNITION

2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights within the Province of Ontario engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.

2.2 The onsite operation, repair, maintenance and servicing of all equipment listed in this agreement shall be performed by a member of the Union including the assembly and dismantling of equipment operated by members of the Union and coming within the jurisdiction of the Union, boom, boom sections and counter-weight installation and removal and any other requirements necessary to put equipment into production or preparation for removal from operations. Additional assistance by other than Union members for the installation or removal of boom, boom sections and counter-weight components shall only be used upon agreement with the Union.

...

## ARTICLE 28

The parties agree that Schedules "A" to "O" attached hereto are incorporated into and form part of this Collective Agreement.

IN WITNESS WHEREOF the parties have caused this instrument to be executed by their duly authorized representatives, THIS 14TH DAY OF NOVEMBER, 1990.

55. Counsel for Local 793 argued that a reading of the recognition clause indicates the collective agreement covers every employer for whom Local 793 has obtained bargaining rights doing work covered by the Schedules. There is no dispute that Local 793 has obtained bargaining rights and the only real issue is whether E. S. Fox was doing work covered by the Schedules. In this regard, counsel asserted that Schedule "B" (the parties agree that this is the only schedule under which E. S. Fox performs work) does not specify that it applies only to construction work or work within the ICI sector. Rather the introductory words of Schedule "B" indicate that it applies to certain types of employers engaged in certain types of work. Counsel submitted that the schedule applies regardless of whether the work performed by the employer covered by that schedule is on a

barge, or in a highrise apartment, or in an industrial factory. The work that is covered by the schedule is the operation of cranes and other similar equipment.

56. Counsel referred to other provisions of the collective agreement in support of his assertion that the parties to the collective agreement intended the agreement to cover all of the activities of the employer in relation to the operation of cranes and other equipment. For example, he drew the Board's attention to the fact that the collective agreement covered the maintenance and servicing work of the equipment arguing that such mechanical work was not normally understood to be construction.

57. As further evidence of the intention of the parties to the agreement counsel for Local 793 referred to the evidence of the witnesses to the effect that they had always been paid in accordance with Schedule "B" of the collective agreement when employed by contractors bound to that schedule notwithstanding that they may not have been engaged in construction activities, or in work that was not steel erection or mechanical installation. Counsel noted that there had not been any challenge to this evidence.

58. Finally counsel for Local 793 referred to the provisions of the collective agreement signed by E. S. Fox prior to the advent of provincial bargaining and the execution of the O.E. province-wide collective agreement in 1978. Thus, he referred to the "pick-up" agreement signed by E. S. Fox in May 1978 in which E. S. Fox agrees to be bound to the newly negotiated province-wide agreement. That pick-up agreement states:

The undersigned Employer hereby approves and accepts the Agreement entered into between the Employer Bargaining Agency designated by the Minister of Labour percent [sic] to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended and the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers, a copy of which is to be filed with the Ontario Labour Relations Board.

The Employer and the Union agree that the agreement referred to in Paragraph 1 above shall apply in all sectors of the construction industry as defined in Sec. 106(e) of the Labour Relations Act and the Crane and Equipment Rental Business, save and except where the Employer is bound by a subsisting Collective Agreement with the Union pertaining to work performed in a certain sector or sectors of the construction industry.

59. In addition, counsel referred to the 1975-1977 collective agreement between E. S. Fox and Local 793. The recognition and union security and jurisdictional claim provisions of that predecessor agreement state:

#### ARTICLE 2 - RECOGNITION AND UNION SECURITY

2.1 The Employer recognizes the Union as the exclusive collective bargaining agent for all employees employed by the Employer in his Erection or Construction Departments in the Province of Ontario, including Federal projects, who come within the jurisdiction of the International Union of Operating Engineers.

• • •

2.3 As a condition of employment, it is agreed that only members in good standing of the International Union of Operating Engineers shall be employed on work coming within the terms of this Agreement.

The classifications within the collective agreement indicate that Local 793 claimed jurisdiction in the operation of all cranes and equipment including the maintenance and repair of such equipment.

60. It was submitted by counsel for Local 793 that these agreements, which in part formed the foundation of E. S. Fox's bargaining rights and continuing contractual obligations with Local 793, show that E. S. Fox and Local 793 intended the collective bargaining relationship between them to extend beyond the parameters of the employer's activity within the ICI sector of the construction industry.

61. Thus, it was argued, the pick-up agreement referred to "all sectors of the construction industry ... *and* the crane and equipment rental business". The latter aspect clearly going beyond mere construction activities.

62. Similarly, the predecessor agreement was evidence that the collective bargaining relationship was not merely limited to E. S. Fox's construction activities as, for example, it spelled out the employer's obligation with respect to such non-construction activities as maintenance of equipment. Moreover, the recognition clause indicates the collective agreement was not limited to construction as it referred to the employer's erection *or* construction departments.

63. Counsel for E. S. Fox submitted that the work on the barge was not work in the construction industry or equipment rental as contemplated by the agreement. In his submissions counsel for E. S. Fox accepted that the O.E. province-wide agreement extended beyond the ICI sector of the construction industry once the employer's activities fell within the coverage of the schedules contained in that agreement. Thus, he accepted that once the employer's activities fell within the categories set out in Schedule "B", namely steel erection or mechanical installation, *all* of the work related to the operation of cranes or equipment with respect to that activity was provided for including, for example, the maintenance of the equipment. Counsel for the employer also adopted the analysis of the Board in *Rumble Contracting* that the introductory words of Schedule "B" defined the coverage of that schedule. It was his position however that the work on the barge did not fall within the definition of coverage in Schedule "B" or of any other schedule.

64. With respect to Schedule "B" of the O.E. province-wide agreement, it was his assertion that E. S. Fox's marine division was not engaged in steel erection or mechanical installations. It was engaged in ship building and ship repair or refitting. Schedule "B" does not apply to ship repair or ship building and therefore the work which gave rise to this grievance is not covered by the O.E. province-wide agreement.

65. Similarly, with respect to the predecessor agreements, counsel argued that E. S. Fox's marine division was not engaged in any sector of the construction industry or in the crane and equipment rental business as referred to in the pick-up agreement. Neither was E. S. Fox's marine division the employers' "erection or construction departments" as referred to in the 1975-1977 predecessor agreement between Local 793 and E. S. Fox. In his view therefore the predecessor agreements did not support the assertion that E. S. Fox had always been bound to apply the O.E. collective agreements to all of its activities and not just its construction activity.

66. Counsel submitted that the evidence disclosed that E. S. Fox engaged in activities beyond its construction activities and that this fact had been recognized and accepted by both trade unions. He pointed to the other collective agreements which E. S. Fox has with the United Steelworkers and the U.A. with respect to the fabricating division and the pipe shop operated by E. S. Fox. He argued that the activities of E. S. Fox's marine division was similarly merely another one of the employer's activities.

#### Decision

67. Before turning to our decision in these two grievance referrals we note that in this pro-

ceeding E. S. Fox did not challenge the authority of either the AMCO or the OEA to bargain on its behalf. There is no suggestion in either the evidence or the submissions of the employer that either of these organizations exceeded their authority to negotiate collective agreements which the union's have asserted extend beyond the ICI sector of the construction industry. Thus, although the AMCO is a designated EBA and in that capacity is statutorily authorized to bargain with respect to E. S. Fox's millwright employees in the ICI sector of the construction industry, no issue was raised that the AMCO did not also have E. S. Fox's authority to bargain with respect to other matters (i.e. the Maintenance Agreement).

68. Similarly, no issue was raised by E. S. Fox that the OEA exceeded its authority to bargain if it negotiated a collective agreement which extends beyond the ICI sector of the construction industry. In this regard we note that the employer is a member of the OEA. The OEA is a constituent of the designated employer's bargaining agency. The OEA is also signatory to the province-wide collective agreement.

69. We accept the submissions of Local 793's counsel (submissions which were not challenged by counsel for E. S. Fox) that while the authority of a designed EBA is limited to negotiating collective agreements with respect to the ICI sector of the construction industry, in the present circumstances it is significant that Schedule "B" is incorporated in a province-wide agreement which was executed by both Local 793 and the OEA. Thus, in our view Schedule "B" attains its legitimacy with respect to the ICI sector of the construction industry because the master portion of the agreement has been executed by the designated EBA (see section 145 of the Act). At the same time, Schedule "B" attains its validity with respect to any other matters because it has been executed by an employers' organization. As a result, E. S. Fox is bound to the entirety of the province-wide collective agreement by virtue of its membership in the OEA, the employer organization which negotiated and signed that collective agreement. It is now well established that a properly authorized employers' organization may bargain on behalf of its employer members beyond the parameters of the construction industry (see for example *Williams Contracting Limited*, [1980] OLRB Rep. July 1115, *London Sandblasting and Painting Limited*, [1982] OLRB Rep. Sept. 1322, and *The Jackson-Lewis Company Limited*, [1981] OLRB Rep. Dec. 1794.) In this regard we also find it important to note that E. S. Fox voluntarily entered into the May 1978 pick-up agreement in which it agreed to be bound to the province-wide agreement. It is not so bound merely by reason of the statutory certification and province-wide bargaining provisions of the Act.

### The Millwrights' Grievance

70. It is a well established rule of interpretation that where the words of a collective agreement are unambiguous they must be given their ordinary meaning without recourse to extrinsic evidence. Where the words on the face of the agreement are ambiguous it is said that a patent ambiguity exists and recourse to extrinsic evidence may be made to assist in interpreting the collective agreement.

71. At times the words on the face of the agreement are not ambiguous but application of those words to the facts is "doubtful" or "difficult". In those instances it is said that there is a latent ambiguity. Where an ambiguity is latent it is permissible to refer to extrinsic evidence to resolve the ambiguity. It is also well established that it is permissible to rely upon extrinsic evidence to disclose whether there is any latent ambiguity. As was stated by the Ontario Court of Appeal in *Leitch Goldmines Limited et al. v. Texas Gulf Sulphur Company (Inc.) et. al.* (1968) 3 D.L.R. 3d 161 at page 215-216:

The Court is not necessarily concerned only with the literal meaning of the language used but rather with its meaning in the light of the intentions of the signatories ...

A transaction having been reduced to writing, extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from its terms. This is fundamental in the interpretation of written instruments. Parol evidence may, however, be admitted in aid of interpretation.

Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of the case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, where the language is equivocal, or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems not to be applied generally to all cases of doubtful meaning or application.

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it.

Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

If the surrounding circumstances, however, do not explain the latent ambiguity an equivocation is said to be established, in which event, in addition to evidence of circumstances, direct evidence of the parties' intentions may be received to resolve the equivocation.

(See also *Noranda Metal Industries Limited, Ferguson Division and International Brotherhood of Electrical Workers, Local 2345 et. al.* (1984) O.R. 2d 529 (Ct. of Appeal); *Re International Union, United Automobile, Aerospace and Agricultural Implement Workers, Local 1967 and McDonald Douglas Canada Limited*, (1984) 47 O.R. 2d 78 (Ont. Divisional Court); and *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349.

72. In our view the words of the Millwrights' provincial (ICI) collective agreement are not ambiguous. The agreement on its face applies only to those employees of the employer in the ICI sector of the construction industry in the Province of Ontario.

73. We recognize that in this instance the Board is adjudicating in its capacity as a Board of Arbitration under section 126 of the Act. Our role therefore is to hear and determine the difference between the parties to the collective agreement arising from the interpretation, application, administration or alleged violation of that collective agreement. The issue before us is not whether the work performed is work in the "construction industry" as that term is defined in the *Labour Relations Act*. Rather, the issue is whether the work on the barge falls within the parameters of the collective agreement. Nonetheless we have found the Board's jurisprudence in defining the term construction industry to be particularly helpful as an examination of the entirety of the collective agreement indicates the intent of the parties to negotiate a collective agreement under the construction industry provisions of the Act.

74. We interpret "construction industry" as that term is used in the collective agreement to involve work in relation to fixtures and not work in relation to chattels. In our view that is the normal, ordinary and commonly understood meaning of the term and the only meaning which in the context of this collective agreement makes sense. There is nothing in the collective agreement to show the parties intended to use the words in some other sense.

75. The barge is a chattel. It is not affixed to the land and is not part of the land. It is both easily removed from its location and generally movable. It is personal property. The work performed by E. S. Fox's employees upon that personal (as opposed to real) property, or upon that chattel, is not work performed by employees in the ICI sector of the construction industry.

76. Neither is the language of the Millwrights' provincial agreement to the facts before us "uncertain or difficult" so as to disclose a latent ambiguity. There is therefore no need to refer to extrinsic evidence to ascertain the meaning of the collective agreement and resolve any ambiguity. The intent of the parties who negotiated this collective agreement and its application is clear from the language used by the parties.

77. On the other hand we view the words of the Millwrights' Maintenance Agreement to be ambiguous. In addition, the application of the language used in that agreement to the facts before us is "uncertain or difficult" and discloses a latent ambiguity. It is "doubtful" (and certainly disputed) whether the work performed by E. S. Fox employees can be characterized as "repair, replacement, maintenance and renovation". The revelation of this latent ambiguity permits us to refer to extrinsic evidence to ascertain the meaning of the collective agreement and resolve the ambiguity.

78. Neither party to the Millwrights' grievance however, placed before this Board any such extrinsic evidence. We have for example no evidence concerning the past practice or application of that collective agreement. We are therefore left only with interpreting the collective agreement and the parties' intent through a careful reading of the entirety of that collective agreement.

79. Having regard to the totality of the agreement we find that the intent of the parties with respect to that collective agreement is in fact stated in its title and preamble. The purpose of the agreement is to permit the work force of a contractor such as E. S. Fox's construction division to compete with "in-house maintenance" crews of "owners" (see article 3(a)) for available work within a plant or "existing facility" (see article 4(d)).

80. The agreement goes on to define both maintenance and repair in terms commonly used by this Board when it is called upon to distinguish between "maintenance" (which is not "construction" within the meaning of the Act) and "repair" (which does fall within the definition of "construction" in the Act). Thus the agreement speaks of work "required to restore by replacement of parts of existing facilities to efficient operating conditions" in much the same manner as the Board's jurisprudence in *Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477; *Levert and Associates Contracting Inc.*, *supra*; and *Quinard Limited*, *supra*.

81. Again we emphasize that our role is to determine the coverage of the Millwrights' Maintenance Collective Agreement, not to determine if the work is "construction" or "maintenance" under the Act. Although we have found the Board's jurisprudence in this area to be of some assistance in determining the intent of the parties to this collective agreement, in determining whether the agreement applies to the work we have considered only the definitions of "maintenance", "repair" and renovation used in the agreement.

82. Having regard to the entirety of the agreement, we find that the work on the barge was not work done on existing equipment or with respect to an existing facility to keep it functioning properly. It was not work done to assist in preserving, sustaining or maintaining the operating condition of an existing system. The wholesale changes to the barge cannot be characterized as "repair, replacement, maintenance and renovation" as those terms are defined in the Maintenance Agreement. It cannot be said that the work was restoration by replacement to enable the barge to operate efficiently or retain its production capacity. The conveyor system installed was not restored but created.

83. For all of these reasons we find that the work on the barge is not covered by any agreement to which E. S. Fox is bound together with the Millwrights. Accordingly, the Millwrights' grievance is hereby dismissed.

### The Operating Engineers' Grievance

84. Next we turn to examine the O.E. province-wide agreement. Unlike the Millwrights' provincial agreement we find the words of the O.E. province-wide agreement to be ambiguous or equivocal. Certainly, the preamble of the collective agreement suggests the agreement is intended to apply only to employees of employers engaged in either the construction industry or equipment rental. The preamble thus lends some support to the employer's position in this case. The preamble however was not referred to by counsel for E. S. Fox in his submissions. Nor was it put to or addressed by any witness in these proceedings. Moreover, it is now well established in arbitral jurisprudence that although a preamble may be used as a guide to interpretation, "it has no independent validity as a source of rights or obligations nor can it override any provisions of the agreement" (Brown & Beatty, *Canadian Labour Arbitration*, 3rd edition at p. 4-27). In any event therefore the preamble must be examined in the context of the recognition provisions of the collective agreement.

85. The recognition provisions appear to extend the coverage of the agreement beyond construction industry or equipment rental activities. The recognition clause refers generally to "all employees - ... engaged in work covered by the schedules and classifications" and arguably is applicable regardless of whether such employees or such work is either in the construction industry or equipment rental as the schedules and classifications generally set out only different classifications of equipment operators. The recognition clause also goes on to specifically deal with matters that are not necessarily construction or equipment rental.

86. In addition the application of that language to the facts is uncertain and difficult and discloses a latent ambiguity. More specifically the application of the schedules creates some ambiguity. With respect to Schedule "B" for example it is "doubtful" (and certainly disputed) whether the work on the barge is steel erection or mechanical installation. It is also doubtful (and certainly disputed) whether that schedule on its face applies to *all* the work of "employers engaged in steel erection or mechanical installation", or only to employers engaged in the steel erection or mechanical installation business while such employer is performing steel erection or mechanical installation.

87. The ambiguity in the language and the latent ambiguity disclosed in its application can be resolved if we have recourse to the extrinsic evidence of past practice in negotiating history to ascertain the intent of the parties to the collective agreement.

88. We heard very little evidence regarding the negotiating history between these parties or for that matter the past practice application of the collective agreement by E. S. Fox which assists us in determining the intent of the parties. The evidence placed before us with respect to either of these two areas came from Local 793.

89. In terms of negotiating history the *only* evidence we heard was Mr. Kennedy's evidence that, at the initial negotiations of the first province-wide agreement under the statutory scheme of province-wide bargaining it was the intent of the union and "clearly understood" by all parties that the province-wide collective agreement would apply to all work performed by all contractors bound to the agreement. This evidence was not shaken on cross-examination or contradicted by any other witness. It is the only direct evidence of the parties' intentions before us. We have no direct evidence from E. S. Fox itself or any signatory to the agreement on behalf of the employers' bargaining agency concerning their intent. Thus, we have not heard any evidence from any representative of E. S. Fox or the OEA (or any other constituent of the EBA) that Mr. Kennedy's impressions of that initial meeting were in error or that the intent or understanding of the contractors who would be bound by such an agreement was not as stated by Mr. Kennedy.

90. The accuracy of Mr. Kennedy's recollection of the intent of the parties and his understanding of the application of the province-wide collective agreement is strengthened by all of the evidence before us as to how E. S. Fox itself has applied the agreement. Thus, the only evidence before us indicates that this employer has always applied Schedule "B" of the collective agreement when it employs qualified operating engineers to perform work on its behalf. This is so regardless of the nature of its activities. For example, we have the evidence of the crane operator who assisted in the transport of a chattel fabricated by E. S. Fox (the vessel required in a desalinization plant) who was employed in accordance with Schedule "B" of the province-wide agreement. This notwithstanding the fact that in that instance E. S. Fox was merely the manufacturer and supplier of that chattel and was not engaged in any "construction" activities in relation to the installation of that chattel. The manufacture of the frame, "catwalks, handrails etc. and other alterations to the barge required for the sole purpose of the safe transport of that chattel from supplier to customer is not necessarily a "construction industry" activity. The same is true for the hoisting work involved with the transport of the shunters and their placement in the water. In that instance the work was also performed in accordance with the province-wide agreement although the mere manufacture, transport and delivery of those chattels by a supplier for a customer also is not necessarily a construction industry activity.

91. The employer has submitted that Local 793 is aware of the fact that it carries on activities other than "construction activities". E. S. fox referred to its pipe fabricating shop and its Niagara Falls Fabricating facility and the collective agreements it has with other unions at those locations. There is no evidence before us, however, to suggest that any cranes or other equipment are used at those facilities, or if used, that the operation of that equipment is done in a manner that is either inconsistent with or in violation of the O.E. province-wide agreement. Indeed, as these two examples indicate the evidence is to the contrary and suggests that even when another division of E. S. Fox has primary responsibility for a project (such as the fabricating division's responsibility for the shunters) the O.E. province-wide agreement is applied to the hoisting or crane work involved with the project.

92. Having regard to the broad recognition clause of the province-wide agreement in the absence of *any* evidence to suggest that the other divisions of E. S. Fox which do not engage in construction industry activities have operated cranes, earthmoving, excavation or similar equipment in a manner which suggests these divisions have not been considered to be bound to the O.E. province-wide agreement, we are not persuaded that the mere existence of such divisions is evidence that the O.E. province-wide agreement applies only to E. S. Fox's construction division.

93. Further evidence about E. S. Fox's intent and its application of the agreement by its other divisions is found in the evidence of the operation of the cranes in a manner consistent with the application of the O.E. province-wide agreement at the barge project location itself. Mr. Holder's evidence that he was paid in accordance with the province-wide agreement when he assembled the crane and used it to unload steel plates at the pipe shop location, and his subsequent evidence about loading and unloading material from the barge and trucks at that location suggests E. S. Fox intended the agreement to apply beyond the activities of its construction division. Although it would appear that Mr. Holder's nominal employer at that time was E. S. Fox's construction division, the work he was doing was not carried out for the benefit of the construction division of E. S. Fox. Instead the work was performed on behalf of and for the benefit of either E. S. Fox's marine division responsible for the barge project or E. S. Fox's pipe fabrication shop division.

94. From the totality of the evidence we have therefore concluded that the intent of the contracting parties to the O.E. province-wide agreement was not to restrict its application to the construction industry. In addition, E. S. Fox itself has not limited the application of this agreement

to its construction activities. Our conclusions that the province-wide agreement is not restricted to activities in the construction industry is confirmed by the evidence we heard of the experience of other Local 793 members employed by other OEA contractors. That evidence also uniformly indicates that the application of the province-wide agreement is not restricted to the construction industry or activities carried on within that industry.

95. This then leads us to the employer's submissions that there is another restriction in the language of the collective agreement which indicates that the collective agreement is not applicable to the work on the barge. It was argued that the collective agreement is not applicable because the work on the barge was not work performed by an "employer engaged in the steel erection or mechanical installations business" as set out in the introductory words of Schedule "B". It was asserted that the work was not work that could be characterized as "steel erection" or "mechanical installation".

96. We are not persuaded by that argument for two reasons. First, there is no doubt that E. S. Fox is an employer "engaged in the steel erection or mechanical installation business within the Province of Ontario". That may not be the only activity of E. S. Fox. The fact that an employer also engages in other activities however, is irrelevant to the interpretation and application of this collective agreement. The fact that E. S. Fox engages in other activities does not detract from the fact that it is also an employer engaged in the steel erection or mechanical installation business within the Province of Ontario.

97. Secondly, and notwithstanding the fact that the identity of the employer at the project was E. S. Fox's "marine division", the work that occurred on the barge can properly be characterized as steel erection or mechanical installation. E. S. Fox sought to characterize this work as "ship building", "ship repair", or "ship refitting". We consider those descriptions to be misnomers. Certainly with respect to those first two terms, E. S. Fox was neither building nor repairing the barge. Rather, it was engaged to install a self-unloading conveyor system on the barge. That activity may perhaps be characterized as "refitting" the barge. The refitting however involved steel erection and mechanical installation. The installation of the conveyor system and the changes made to the barge to convert it to a self-unloading barge involved work that would typically be characterized as steel erection and mechanical installation if it were to be performed within an industrial facility or as part of a new construction project. That self-unloading system was made of steel and the hoisting and crane work involved with the installation of that system can be said to be steel erection. The fact that such work took place on a chattel rather than in relation to real property does not affect the fact that the work continued to be steel erection or mechanical installation. Moreover, the fact that it was performed by E. S. Fox's marine division simply means that this division at the time was an "employer engaged in steel erection or mechanical installation" within the meaning of the collective agreement. We reject the suggestion implicit in the employer's submissions that because steel erection or mechanical installation is not the only or not the typical or preponderant activity of an employer, the employer is therefore not engaged in the steel erection or mechanical installation business.

98. For all of these reasons we find that the O.E. province-wide collective agreement does apply to the work on the barge. E. S. Fox has admitted that it did not employ Local 793 members on the job to operate the equipment. Local 793's grievance is therefore allowed. The Board will remain seized of the issue of damages in the event the parties are unable to resolve that issue.

**DECISION OF BOARD MEMBER F. B. REAUME; April 21, 1993**

1. I strongly dissent from the majority decision with respect to File No. 3256-91-G.
2. It is clear to me, and the majority decision fails to change this, that the work in question is outside the Provincial Collective Agreement the respondent employer is party to with the applicant union.
3. The preamble of the Provincial Collective Agreement clearly shows that the collective agreement is intended to apply only to employees of the employers engaged in either the construction industry *or* equipment rental (business) within the Province of Ontario. Nothing in the recognition provisions acts to extend the coverage of the agreement beyond either the construction industry or equipment rental (business). Under article 2.1 the union must show *where it has bargaining rights*. As far as E.S. Fox is concerned, these rights were clearly stated in the last agreement signed between the parties just prior to the execution of the Operating Engineers province wide collective agreement in 1978. In this "pick-up" agreement signed by the parties to this grievance in May of 1978, it was agreed that (as far as E.S. Fox was concerned) the Provincial Agreement "shall apply in all sectors of the construction industry as defined in section 106(c) of the *Labour Relations Act* and the Crane Rental Business, save and except ... of the construction industry". We have no evidence of the further extension of this understanding between the parties after May of 1978.
4. Furthermore, with respect to the preamble of the Operating Engineers' Provincial Agreement, there are *only* two groups of employers referenced, those engaged in equipment rental (a service business) and those engaged in the construction industry. Since Schedule "A" clearly deals with the former group, it stands to reason that the balance of the schedules *must* deal with employers engaged in the construction industry. Further evidence of this two group division is confirmed by a review of the schedules. Schedule "A" provides a seniority clause which *all* the other schedules, as is customary in the construction industry, do not. Thus all the schedules from "B" to "O" should be recognized as pertaining to the construction industry.
5. I need only point out that the periodic use of members of the union outside construction (even on ship repair or refitting) under the terms of Schedule "B" must be taken with the knowledge that employers often use construction employees on work outside their agreement as needed especially in emergencies, during bad weather, or to avoid lay-offs, for the mutual good of the company and the employee. E.S. Fox applied the terms of Schedule "B" so as to ensure a satisfied employee as per the normal practice in the industry.
6. The bold assertion by Mr. J. Kennedy of the Operating Engineers, particularly in light of the make-up of the panel, that it was the intent of the union *and* "clearly understood" by all parties that the province-wide collective agreement would apply to *all work* performed by all contractors bound to the agreement, is to say the least enlightening. The best evidence we have to the contrary, although not given personally at the hearing by an E.S. Fox or Ontario Erectors' Association representative, is the clear and *deliberate action* by the employer in removing an Operating Engineer employee from the job in question prior to the assignment of work to another union in an all-employee voluntary agreement arrangement. They did it openly and obviously did not "clearly understand" they were bound in any way by the Operating Engineers Agreement for their barge refit. I do not doubt it was the union's intent as stated above by Mr. Kennedy, but a number of employers would put the Operating Engineers to strict proof of their bargaining rights even outside the I.C.I. sector of the construction industry. Mr. Kennedy should not be surprised at my skepticism with regard to this evidence, since the Ontario Erectors' Association does not even give this

recognition to their principle trade-agreement namely the Structural Ironworkers. Perhaps Mr. Kennedy meant to say "all construction work", perhaps not.

7. The recognition clause deals as well with the general maintenance of tools or equipment which in principle applies to all construction trades and does nothing to determine the scope of the agreement. The recognition clause in 2.1 refers to "*all employees of the employer for whom the union has bargaining rights etc.*". In my opinion the union has failed to show that it has bargaining rights with E. S. Fox outside "all sectors of the construction industry as defined in the *Labour Relations Act* and the Crane and Equipment Rental Business".

8. I can only conclude that the application of the province-wide agreement is clearly restricted to the construction industry or activities carried on within that industry, and crane and equipment rental and does not apply therefore to the barge refit since it is clearly outside the scope of the provincial agreement.

9. For the above reasons, I would have dismissed the grievance.

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**3208-92-R** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant v. **KMT Technical Services**, a division of 839197 Ontario Limited, Responding Party

**Certification - Constitutional Law - Employer engaged in, among other things, maintenance and repair of ships - Whether employer's labour relations falling within federal or provincial jurisdiction - Majority of company's shipping-related sales consisting of repairs performed for ships docked over winter months when ships not in operation - Company's activities not "vital" to core federal undertakings as "operating systems" - Employer's activities generally carried out in autonomous and unintegrated fashion, separate and apart from federal undertakings' ongoing operations - Board concluding that company's operations falling within provincial labour relations jurisdiction - Certificate issuing**

**BEFORE:** *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

**APPEARANCES:** *Laurence C. Arnold* and *Robert Humphreys* for the applicant; *Bruce Pollock*, *Lorna Cuthbert* and *John Pevac* for the responding party.

**DECISION OF THE BOARD;** April 19, 1993

1. The title of proceedings is amended to reflect the correct names of the parties: "The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the union" or "the applicant"); and, "KMT Technical Services, a division of 839197 Ontario Limited" ("the company").

2. This is an application for certification in which the company has raised the issue of the constitutional jurisdiction of this Board over the company's labour relations.

3. The company is engaged, among other things, in the maintenance and repair of ships. "Shipping and Navigation" is a federal head of power under section 91(10) of the *Constitution Act, 1867*. The company asserts that its activities are "vital", "essential", or "integral" to shipping and, therefore, within federal jurisdiction. In the alternative, the company submits that it is engaged in a "local work or undertaking" of a kind which is expressly excluded from provincial jurisdiction under section 92(10)(a) of the *Constitution Act, 1867*, i.e. a work or undertaking "... connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province ...". Such undertakings fall within federal jurisdiction under section 91(29) of the *Constitution Act, 1867*.

### The Facts

4. The only witness to testify was Mr. John Pevec, the individual responsible for the company's business operations. The company commenced operations in November or December of 1989. Its shares are owned fifty per cent by Mr. Pevec and fifty per cent by Mr. George Kirchmair. Mr. Kirchmair is also the sole shareholder of Kirchmair Machine & Tool Co. Ltd. ("Kirchmair"). Kirchmair is a machine shop located at 1018 Gladwish Drive, Sarnia, Ontario. Kirchmair shares this business address with the company, and the company utilizes some of Kirchmair's facilities, both directly and with Kirchmair acting as an occasional subcontractor. When working on Kirchmair's premises, the company's employees perform welding and mechanical tasks. All machining is done by Kirchmair. Kirchmair also handles the company's payroll. On the date of application, the company employed ten employees, nine of whom were in the agreed upon bargaining unit.

5. The company's operations can be divided into two broad categories: ship maintenance and repair, and industrial work. The quantity of work attributable to each category has varied since the inception of the company's operations. From November or December of 1989 to April of 1991, ship maintenance and repair constituted approximately 60 per cent of the company's work, with the remaining 40 per cent being industrial work. For the period April 1991 to April 1992, the former rose to 90-95 per cent of the company's overall sales. In the current fiscal year Mr. Pevec anticipates that approximately 95 per cent of the company's sales will be derived from ship maintenance and repair.

6. Mr. Pevec identified two major customers: ULS Corporation ("ULS") and Enerchem Transportation ("Enerchem"). "ULS", the Board was told, is an abbreviation of Upper Lakes Shipping. ULS operates self-unloading bulk carriers and straight back bulk carriers in the Great Lakes and along the eastern seaboard. Enerchem has among its fleet class 2 chemical carriers which are licensed to sail worldwide. Mr. Pevec testified that the company has worked on both lake freighters and ocean going vessels.

7. The company's shipping repairs are of three types: piping, mechanical and plating. Piping constitutes about 75 to 80 per cent of the total, with the balance being divided equally between mechanical and plating. Piping may involve work on air piping, ballast lines, steam lines, general service lines, lube oil lines, fuel lines, sewage lines, steam tracing or hydraulics.

8. Air piping is used for general service air or in starting the ship's main engines or generators. Ballast lines involve a series of pipes that are necessary to the raising and lowering of a ship when it is being loaded or unloaded. Steam lines may be used for propulsion turbines, generators, heating systems, fuel oil systems or for heating cargo to prevent it from solidifying. General service lines are involved in cooling water, cooling fuel nozzle tips on diesel powered ships, in refrigeration

systems, fire lines, and for carrying domestic water. Lube oil lines are found in the main engines, generators and electrical compressors. Fuel lines carry fuel to the ship's main engines, boilers, generators, cargo pumps and direct drive machinery. Steam tracing may be utilized, for example, to keep particular products at a constant temperature when being carried through pipes. Piping may also be found in the ship's hydraulic lines, and may be used in raising and lowering anchors, cargo and booms.

9. The dependency of a vessel on any of these systems varies. Steam lines are more essential to the running of a steamship than they are to a diesel powered ship. Likewise, not all ships utilize hydraulics in loading and unloading cargo. Fuel lines would however be critical to the operation of most ships. Mr. Pevec testified that the company is involved in the maintenance and repair of piping in respect of all types of ships whether, for example, propelled by steam or diesel or loaded and unloaded manually or by hydraulics.

10. The company's mechanical work consists of rebuilds and overhauls of pumps used to circulate water or fuel or in connection with hydraulics for use in loading and unloading. Other mechanical work may involve repairs to engines or to unloading equipment. Plating has only been performed by the company recently. It may involve both internal or external ship side plating. In sum, according to Mr. Pevec, the company performs work on "... virtually every aspect of a ship except electronics and electrical".

11. The company's shipping related work varies as to location and time of year. Work may be carried out on board ship, on Kirchmair's premises or on the premises of a subcontractor. The ship may be tied up in port for a matter of hours or days, it may be docked for the winter months (from December or January to March or April), or it may be travelling between ports. Mr. Pevec referred to the last two types of activities as "running repairs", adding that the company "goes wherever the job is".

12. During the first 15 to 17 months of its operation, 75 per cent of the company's ship maintenance and repair work was performed for ships tied up in port in Ontario, Quebec and P.E.I. The bulk of this work was performed off the ship either in Kirchmair's premises or in those of a subcontractor. The remaining 25 per cent was winter work. In the case of the P.E.I. contract, the work involved the fabrication and delivery of hatch covers. Inspection and measuring took place on board ship, but fabrication occurred in the shop. The covers were delivered to P.E.I. and installed by a third party. Another job in the first year involved "canal fendering", the preparation of wooden brackets to protect the sides of a ship from damage. Wood was purchased and cut by the company and installed on a ship tied up in Sarnia. At first, Mr. Pevec could not recall whether any work was done on board a ship in transit, but he later suggested that there may have been one or two small "travelling" jobs.

13. In the fiscal year 1991-1992, 75 per cent of the company's ship maintenance and repair work was done while ships were laid up for the winter months. Three-quarters of the remaining work was performed on board ships in harbour, with the balance being performed on board ships in transit.

14. By the completion of the current fiscal year, Mr. Pevec estimates that 80 per cent of the company's ship maintenance and repair work will have been performed in the winter months. Of the remaining 20 per cent, 60 per cent will have been performed while ships were tied up in port and 40 per cent while travelling between ports. About 10 per cent of this latter figure will have been attributable to a contract for repairs on board a ship travelling between Sarnia and Port Huron, Michigan. In the company's three and a half year existence, the Sarnia - Port Huron contract will have been the only work performed on board a vessel travelling between ports not

entirely within Ontario. Work has also been performed in 1992-1993 for ships docked in Hamilton, Port Colborne and Montreal.

15. When ship repairs are performed in the summer months, a ship's engineer or welder may assist the company's employees, but Mr. Pevec said that this is more the exception than the rule. In the winter months, there may only be a watchman or "ship keeper" on board. This individual may or may not assist depending upon availability.

16. The company's industrial work is entirely local in nature and performed year round, consisting, for example, of fabricating or repairing parts for use in the chemical or food processing industries.

17. The same employees may be called upon to perform both shipping and industrial work. At the time of the application eight of the nine employees in the bargaining unit were classified as pipefitter/welders. One employee was designated as a labourer. Mr. Pevec testified that the skills demanded of the work force can change with the job. Mechanical work will generally require mechanical people, while plating work may require boilermakers. Mr. Pevec testified that he tries to obtain the most versatile employees possible.

18. The company generally obtains its personnel in Sarnia. This was true of all of the employees in the bargaining unit at the time of the application. The company's employees are then dispatched to other locations as needed, although in some limited instances, personnel have also been hired at the location in which the ship is docked.

19. The only one of the company's competitors which was identified in these proceedings was Hamilton Marine. As indicated below, Hamilton Marine was the subject of an earlier decision of the Board, differently constituted, which dealt with a similar constitutional issue.

#### The Parties' Submissions

##### The Company

20. The company's "primary" argument is that its work is integrally related to shipping and, therefore, within federal jurisdiction under section 91(10) of the *Constitution Act, 1867*.

21. According to company counsel where, as here, the undertaking in question is not directly involved in shipping, two issues arise. First, is there a core federal undertaking present. Counsel submits that this first requirement is met through the nature of the company's customers, i.e. shipping companies operating both within and beyond the boundaries of the Province of Ontario. The second issue is whether the activities of the undertaking in question are "vital", "essential" or "integral" to the core federal undertaking. This requirement, counsel submits, is satisfied by the fact that it is the company's business to "keep ships running".

22. In support of the latter position, counsel submits that over the last couple of years approximately 20 per cent of the company's repair activities have been performed on board ships in transit. Even more important, however, is the nature of the repairs themselves. Counsel points out that most of the company's work involves piping, which is essential to the ongoing safe and efficient operation of the vessel. By way of example, counsel refers to the cooling of lube oil and the carriage of fuel, noting that "if the fuel doesn't get to the engine, the ship doesn't go".

23. Counsel describes the company's industrial work as purely incidental in nature, and reminds the Board that not all of an undertaking's work must be "federal" for the undertaking to

be federally regulated. The focus is on the normal and habitual nature of the work, and not incidental factors. The normal and habitual nature of the company's work according to counsel, is ship repairs and, in particular, the maintenance and repair of piping.

24. Counsel for the company relies on the following cases and materials:

*Laskin's Canadian Constitutional Law* (5th ed., 1986, Finklestein), pp. 631-634.

*Reference Re Industrial Relations and Disputes Investigations Act*, [1955] 3 D.L.R. 721 (S.C.C.) (the Stevedore's case).

*Northern Telecom Ltd. v. Communications Workers of Canada et al.* (1979), 98 D.L.R. (3d) 1 (S.C.C.) (Northern Telecom "No. 1").

*Northern Telecom Canada Ltd. et al. v. Communication Workers of Canada et al.* (1983), 147 D.L.R. (3d) 1 (S.C.C.) (Northern Telecom "No. 2").

*Hamilton Marine*, [1985] OLRB Rep. Aug. 1228.

*International Longshoremen's Association, Local 1925 v. Brown and Ryan Limited and International Longshoreman's Association, Local 1926 v. Eastern Canada Stevedoring (1963) Ltd.* 66 CLLC 901 (C.L.R.B.).

*R. v. Nova Scotia Labour Rel. Bd., Ex Parte J. P. Porter Co. Ltd.* (1968), 68 D.L.R. (2d) 613 (N.S.S.C.).

*Re North Canada Air Ltd. and Canada Labour Relations Board (No. 1)* (1980), 117 D.L.R. (3d) 206 (F.C.A.).

*Canadian Communications Structures Inc.*, [1992] OLRB Rep. July 777.

*Re Bernshine Mobile Maintenance Ltd. and Canada Labour Relations Board* (1985) 22 D.L.R. (4th) 748 (F.C.A.).

25. As a "secondary" argument, counsel submits that the company is engaged in a work or undertaking "... connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province ...", within the meaning of section 92(10)(a) of the *Constitution Act, 1867*. As indicated above, such undertakings fall within federal jurisdiction under section 91(29) of the *Constitution Act, 1867*.

26. Counsel submits that federal jurisdiction over interprovincial undertakings is not limited to transportation or "transportation type" undertakings, but may involve those "connected with" transportation. While counsel says that "only one per cent" of the company's activities have involved repairs on board vessels in transit beyond Ontario, i.e. across the Detroit River from Sarnia to Port Huron, the company is "ready, willing and able" to perform such services and has done so whenever requested by the customer. Reference is made to the decision of the Court of Appeal in *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.* (1983) 44 O.R. (2d) 560 (the "OC-Transpo" case).

27. Accordingly, counsel submits, the Board is without jurisdiction to certify the union as the bargaining agent of the company's employees.

## The Union

28. Union counsel rejects the submission that the company's activities are "vital" or "essential" to shipping in the way demanded by the authorities, and suggests that "the essence of the case is that the Board will finally have to decide whether *all* ship repair activity is federal or provincial". By this, counsel refers to the Board's earlier decision in *Hamilton Marine*, *supra*, relied on by the company.

29. In *Hamilton Marine* the Board ruled that it lacked the constitutional jurisdiction necessary to declare a sale of a business or to make a related employer declaration in respect of a transaction between two corporate subsidiaries of ULS. For reasons discussed more fully below, the Board found that the alleged purchaser of the ship repair and maintenance business, Hamilton Marine, fell within federal jurisdiction, because:

[t]he function of the ships as a method of transportation is vitally and essentially affected by the activities of Hamilton Marine. Allowing for the wide interpretation usually given to shipping and navigation under head 10 of section 91, the Board finds that Hamilton Marine's operations are an essential component to operating a federal work or undertaking, navigation and shipping, and that the labour relations of its employees are governed not by the *Labour Relations Act*, but rather by the *Labour Code, Canada* (para. 24, p. 1236).

In *Hamilton Marine*, the Board also accepted the alternative basis for federal jurisdiction advanced by company counsel in the present case, i.e. that "the pith and substance of Hamilton Marine's business is a work or undertaking which provides running repairs which connect Ontario with any other or other of the provinces or extending beyond the limits of Ontario" (para. 26, p. 1237).

30. Union counsel distinguishes the facts in *Hamilton Marine* from those in the present case on a number of grounds, including the nature and extent of the "running repairs" performed by Hamilton Marine and the amount of such repairs performed on board ships in transit beyond the boundaries of the province. Unlike *Hamilton Marine*, counsel suggests, the bulk of the company's repairs are performed in dry dock and are not "immediately essential" to the running of the ship. Union counsel draws an analogy between repairs performed in port or dry dock and construction work, which has generally been found to fall within provincial jurisdiction.

31. Counsel describes the company's alternative argument under sections 92(10)(a) and 91(29) of the *Constitution Act, 1867* as "something of a red-herring". He submits that in order for provincial jurisdiction to be excluded under section 92(10)(a), the company must be engaged in an interprovincial or international undertaking and that the only such undertaking present is shipping. Accordingly, the company can only succeed on this argument if it also succeeds on its first argument under section 91(10). Dealing with the argument on its merits, however, union counsel submits that one international trip in the company's three and a half year history does not an interprovincial or international undertaking make.

32. Union counsel relies on the following authorities:

*Montcalm Construction Inc. v. Minimum Wage Commission et al.* (1978), 93 D.L.R. (3d) 641;

Hogg, *Constitutional Law of Canada*, (1977) p. 324;

*Toronto Electric Commissioners v. Snider et al.* [1925] A.C. 396;

*Industrial Relations and Disputes Investigation Act v. Eastern Canada Stevedoring Company Limited*, [1955] S.C.R. 529 (the “*Stevedore’s case*);

*R. F. Welch British Columbia Limited and Construction & General Labourers’ Union, Local 602*, [1982] 1 Can LRBR 466 (B.C.L.R.B.);

*Wakeham & Son Ltd.*, [1981] OLRB Rep. July 1036;

*Bachmeier Diamond and Percussion Drilling Co. Ltd. and Beaverlodge District of Mine and Smelter Workers’ Local Union No. 913*, (1962) 35 D.L.R. 241 (Sask. C.A.);

*R. v. Ontario Labour Relations Board, Ex Parte Dunn*, (1963) 2 O.R. 301 (Ont. H.C.J.);

*R. v. Ontario Labour Relations Board Ex Parte Underwater-Gas Dev. Ltd.*, [1960] O.R. 416 (Ont. C.A.);

*Tymac Launch Service Ltd. and Canadian Brotherhood of Railway, Transport and General Workers, Local No. 400*, [1980] 3 Can LRBR 552 (B.C.L.R.B.).

33. Having regard to the foregoing, and to the general rule that labour relations are *prima facie* within provincial jurisdiction, counsel submits that the Board has the jurisdiction necessary to certify the union as the employees’ bargaining agent.

#### Decision

34. Labour relations do not form a discrete head of power under the *Constitution Act, 1867*. They are considered to fall within provincial competence over “Property and Civil Rights”, except to the extent that they form an integral part of another aspect of federal jurisdiction. Thus, provincial competence over labour relations is the rule and federal jurisdiction is the exception: *Construction Montcalm*, *supra*, at page 652.

35. Where the undertaking in question is not itself a “core federal undertaking” (i.e., one which falls within the powers specifically enumerated in section 91 of the *Constitution Act, 1867*), its labour relations may still be federally regulated if its activities have a sufficient connection to a core federal undertaking. The classic example is the *Stevedore’s case*, *supra*, where the Supreme Court of Canada upheld the predecessor to the *Canada Labour Code*, R.S.C. c. L-1 as valid federal legislation, and ruled that it applied to the employees of a local stevedoring company because of the intimate involvement of their activities with those of the shipping industry.

36. The cases also make clear that “niceties of corporate organization are not determinative”: *Northern Telecom “No. 1”*, *supra*, at page 15. A “subsidiary” enterprise may fall within federal jurisdiction even in the absence of a corporate connection to a core federal undertaking, and the labour relations of a single corporate undertaking may be divided along constitutional lines. In each case, the issue is the degree of connection between the activities of the subsidiary and those of the core federal undertaking.

37. A number of phrases have been relied on to characterize the degree of connection necessary to trigger federal jurisdiction. These include “vital”, “essential”, “integral” or “necessarily incidental” to the core federal undertaking. Divorced from their factual contexts, however, these terms may obscure more than they reveal. For example, an airline cannot operate without aircraft,

but the labour relations of aircraft manufacturers fall within provincial competence. It is necessary, therefore, to probe beneath the surface of these phrases to see precisely what it is that they are intended to capture.

38. As noted by the Supreme Court of Canada in *Northern Telecom* “No. 1”, the focus must be on the “normal or habitual activities of [the “subsidiary” undertaking] as a going concern”, and “to the practical and functional relationship of those activities to the core federal undertaking”. In *Northern Telecom* “No. 2”, the Court stated:

The principle and dominant consideration in determining the application of the principle enunciated in the *Stevedore's* case is an examination of “the physical and operational connection” between the installers of Telecom and the federal core undertaking, the telephone network, and in particular the extent of the involvement of the installers in the establishment and operation of the federal undertaking as an operating system. (p. 26)

In making this assessment, the Court said that one must look to the “... continuity and regularity of the connection and not ... be influenced by exceptional or casual factors” (page 15).

39. The result in *Northern Telecom* “No. 2” was a finding that Northern Telecom installers working on Bell Canada’s premises fell within federal jurisdiction for labour relations purposes. The majority decision was based upon the following facts: 80 per cent of the installers’ work was carried out on the premises of Bell Canada, a core federal undertaking, and involved contact with Bell Canada employees; there was a very close, tightly scheduled integration of the installers’ services with the acceptance of those services by Bell’s employees without interruption of the Bell network; and the expansion or replacement of Bell’s telecommunications equipment by the installers was part of a continuous process of expansion, updating and renewal of the Bell system which was vital to its operations as a going concern. Despite these factors, however, Dickson J., in a concurring judgement, suggested that the case was “very close to the boundary line”, and two other members of the Court felt that it was over the line.

40. To similar effect is a more recent decision of the Supreme Court of Canada in *Central Western Railway Corporation v. United Transportation Union et al.* (1990), 76 D.L.R. (4th) 1. That case involved a challenge to the jurisdiction of the Canada Labour Relations Board to grant successor rights to a trade union representing employees of the Canadian National Railway following the severance and sale of a 105 mile segment of CNR track situate wholly within the Province of Alberta. Speaking for eight members of the Court, Dickson C.J.C. stated that the test developed in *Northern Telecom* “No. 1” “... involves looking for a practical or functional integration between the core federal work or undertaking and the employees in question”, and that “if work occurs simultaneously between the two enterprises functional integration may exist” (page 20). On the facts, the Court found that each of the two railways “operated independently within its own sphere” and, unlike *Northern Telecom* “No. 2”, could not be seen as working together to provide a single service. For these and other reasons, the Court found in favour of provincial jurisdiction.

41. Applying the tests developed in *Northern Telecom* “Nos. 1 & 2” to the facts at hand, the Board is prepared to accept, without deciding, that there are core federal undertakings present in the form of international or interprovincial shipping undertakings. (The Board notes, however, that it was supplied with no information as to the percentage of the company’s sales attributable to such undertakings.) The real issue, however, is whether the company has demonstrated a sufficient connection between its activities and those of its federal customers.

42. A review of the evidence reveals that the overwhelming majority of the company’s shipping related sales (75 to 80 per cent) consists of repairs performed for ships docked over the winter months, when the ships are not in operation. On average, for the last two years, only 6 to 8 per

cent of the company's shipping repairs (and a slightly smaller percentage of the company's overall sales) occurred on board ships in transit. In these circumstances, it is difficult to view the company's activities as "vital" or "essential" to the core federal undertakings as "operating systems". Unlike the situation in *Northern Telecom* "No. 2", there is little need for the kind of close "co-ordination" or "tightly scheduled integration" of the company's activities with those of its customers to ensure uninterrupted service. This is because the bulk of the company's work is performed when the ships are otherwise out of service.

43. Also significant from a labour relations perspective is the dearth of evidence of contact between the company's employees and those of its customers. The predominant parts of the company's activities are performed either apart from, or in the absence of, the employees of the federal undertakings. This is equally true whether the company's winter work is viewed in isolation or taken together with the additional, but relatively insubstantial, quantity of repairs performed for ships tied up in port. In the two examples cited in the first year, the company's work appeared to involve a significant degree of fabrication away from the ship and somewhat less work carried out on board the ship itself.

44. The picture we are left with then is of a company engaged in activities which may be of importance to its customers but which are generally carried out in an autonomous and unintegrated fashion, separate and apart from the federal undertakings' ongoing operations.

45. By way of contrast, in *Hamilton Marine* a substantial quantity of the subsidiary's work (approximately 50 per cent) consisted of "running repairs" performed on board ships in transit. Indeed, the Board found that Hamilton Marine was created to carry out such repairs, the whole purpose of which was "... to keep the ship working on its tasks and to keep it out of dry dock" (page 1323, para. 18). In this way, ULS would not be losing an average of \$1,000.00 an hour for ships that were stopped or "... spending between 3 and 4 million dollars each year on repairs done by outside contractors" (page 1229, para. 6). Thus, it was the Board's conclusion that "*the running repairs* provided by Hamilton Marine are essential to the safe and continued operations of the ship which received these services" (page 1236, para. 23) (emphasis added).

46. The decision of the Supreme Court of Canada in the *Stevedore's* case also does not assist the company. Critical to the outcome of that case was the central role played by stevedores in the service provided by the shipping companies. The business of the steamship companies was (in the words of Estey J.) "the transportation of freight *and the loading and unloading thereof*" (page 759) (emphasis added). In his judgement, Taschereau J. observed that "the transportation of goods by water by means of ships, is an operation entirely dependent on the services of the stevedores of the company and both are so closely connected that they must be considered *as forming part of the same business*" (page 735) (emphasis added). The Court also noted that the role of the stevedores in the services provided by the shipping companies was reflected in the fact that their work on board ship was carried out under the direction of the ship's officers. The distinction, then, between the *Stevedore's* case and the present is between the provision of services *to* the shipping companies and the participation in the provision of services *by* the shipping companies. The company is engaged in the former. Stevedores are engaged in the latter.

47. The Board also derives little assistance from the decision of the Nova Scotia Supreme Court in *J. B. Porter Co. Ltd.* (1968), 68 D.L.R. (2d) 613. In that case, the Court's decision that persons engaged in the maintenance, repair and rehabilitation of a federal dredging undertaking at its Dartmouth Depot fell within the ambit of federal labour relations jurisdiction, appeared to rest heavily on the fact that the work was performed within the same corporate vehicle as the core federal undertaking.

48. Similarly, the decisions of the Federal Court of Appeal in *North Canada Air*, *supra*, and *Bernshine Mobile Maintenance*, *supra* do not advance the company's arguments. In *North Canada Air* the subsidiary company was involved in the servicing of its parent airline's electronic equipment on an ongoing basis. The evidence was that the parent company's aircraft could not take off unless its avionic equipment had been inspected and certified. This work was carried out by the employees of the subsidiary which was, itself, subject to federal transportation regulations. In *Bernshine*, the alleged successor's tire maintenance operations were acknowledged by the parties themselves as being "critical" to the operations of the interprovincial trucking undertaking. More importantly, however, they were performed on a 24 hour a day, 365 days a year basis from the interprovincial trucking company's premises using the latter's equipment. Both of these cases involved a level of ongoing operational integration and interdependence which is entirely lacking in the present case.

49. In the result, the Board finds that provincial jurisdiction over the company's labour relations is not precluded by section 91(10) of the *Constitution Act, 1867*. In reaching this result, the Board finds it unnecessary to rely on the "construction" analogy put forward by the union. As noted by the Federal Court of Appeal in *Re Canada Labour Code* (1986), 34 D.L.R. (4th) 228, the result in such cases as *Construction Montcalm*, *supra*, may simply be understood as an expression of the requirement that there be a high degree of ongoing operational integration between two enterprises before federal jurisdiction will arise.

50. The Board's conclusion on the company's first argument also disposes of the second. Works or undertakings "... connecting the Province with any other or others of the Provinces or extending beyond the Limits of the Province ..." within the meaning of section 92(10)(a) of the *Constitution Act, 1867* are restricted to transportation or communications undertakings (Hogg P., *Constitutional Law* (3rd ed.) 1992 pages 22-5). Accordingly, since the company's operations are not within the ambit of federal jurisdiction over "Shipping and Navigation", and do not involve any other transportation or communications undertaking, the company's labour relations do not fall within federal jurisdiction under sections 92(10)(a) and 91(29). Moreover, on the basis of the evidence adduced in these proceedings, we are of the view that the frequency of the company's interprovincial or international work does not satisfy the "regular and continuous" test set out in the *OC-Transpo* case, *supra*. This single isolated contract undertaken and completed entirely within the last year is "exceptional", rather than "regular and continuous".

51. Finally, although the parties were unable to direct the Board to any case squarely on point, the Board notes the view expressed by the British Columbia Labour Relations Board that the pattern of provincial certification of ship repair operations performed in the Port of Vancouver and in dry dock is supportable on constitutional grounds: *Tymac Launch Service Ltd. v. Canadian Brotherhood of Railway, Transport and General Workers, Local 400*, *supra*.

52. For the foregoing reasons, the Board has concluded that the company's operations fall within the ambit of provincial jurisdiction for labour relations purposes. Thus, we have jurisdiction to entertain this application.

53. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

54. Having regard to the agreement of the parties, the Board also finds that the following constitutes a unit of employees appropriate for collective bargaining:

all employees of 839197 Ontario Limited in its KMT Technical Services Division in the Province

of Ontario, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff, and students regularly employed during the school vacation period.

55. The Board further finds that more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 5, 1993, the certification application date, had applied to become or were members of the applicant on or before that date.

56. A certificate will issue to the applicant.

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**2912-92-M United Food & Commercial Workers International Union, Local 175/633, Applicant v. 810048 Ontario Limited c.o.b. as Loeb Highland, Responding Party**

Discharge - Discharge for Union Activity - Evidence - Interim Relief - Practice and Procedure - Remedies - Unfair Labour Practice - Board commenting on importance of filing accurate declarations confirmed by persons with first-hand knowledge - Board unwilling to rely on hearsay material - Union alleging that employee discharged for union activity and seeking interim reinstatement with compensation - Employer denying anti-union *animus* and claiming that discharge motivated by employee having lied to management about theft committed by another employee - Board rejecting argument that interim relief power should be used only in rare and exceptional circumstances - Board concluding that complaint and declarations reflecting arguable case on the merits - Board noting chilling effect of discharge on organizing campaign and that union organizing drive a relatively fragile enterprise in which momentum is often critical - Board recognizing potential harm to employer in temporary negative effect on managerial authority and on its policy regarding theft - On balance, harm from granting order held to be less than harm which might flow from not granting it - Board directing interim reinstatement, but declining to award interim compensation

**BEFORE:** *Judith McCormack*, Chair, and Board Members *J.A. Ronson* and *D.A. Patterson*.

*[The decision of the majority in this case dated March 12, 1993 is reported at [1993] OLRB Rep. March 197: Editor]*

**DECISION OF BOARD MEMBER JAMES A. RONSON:** April 23, 1993

1. As a result of the intense discussion surrounding the recent amendments to the Act (commonly referred to as Bill 40), I think there can be little doubt that the Legislature intended that the Board should enquire immediately into the circumstances surrounding every termination of an employee acting as an "in-house" organizer for a union during an organizing campaign. This case is the first such situation to come before the Board. The applicant union has requested that this panel grant interim relief by ordering the respondent employer to put the organizer back to work while another panel of the Board deals with the merits of the termination by way of the new expedited hearing process of the Board.

2. It is also clear to me that the Legislature felt that the effect of the termination of an organizer during a union campaign was so severe that, in most situations, the Board should exercise its discretion to reinstate the organizer pending a hearing to determine if the employer's motive was tainted by anti-union animus.

3. In this case the organizer was terminated for providing a false alibi for a thief (also an employee). The alleged facts were put before us in the form of declarations which, on both sides, contained a large measure of hearsay based on the information and belief of the declarants. Given the time constraints it may well be that this is the best the Board should expect in these cases. In any event, from the material before us, both sides alleged a strong factual basis for submitting that the panel hearing the merits of the unfair labour practice should rule in their favour.

4. By concurring with my colleagues I do not in any way intend to comment adversely on the employer's reaction to the problem of theft in its workplace. It is generally known that theft costs the retail industry millions of dollars every week. I am aware also that employers in the retail food trade consistently enforce a policy of "zero tolerance" when an employee becomes part of this very serious problem. Termination of employment is a severe penalty, but then the same may be said if a criminal conviction resulted from the same circumstances.

5. I have assessed the aspect of continuing risk to the employer, i.e. the likelihood that the union organizer might become involved in a theft from the employer during the fairly short period that it will take to decide the expedited case on the merits. I assess that risk as minimal and therefore concur in ordering that the union organizer be returned to work without compensation.

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**3068-92-G International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Applicant v. Mohawk Services, Responding Party**

**Construction Industry - Construction Industry Grievance - Practice and Procedure - Reconsideration - Party seeking reconsideration not using Form A-47 - Reconsideration request not made within 30 day period specified in Rule 85 and containing nothing prompting Board to grant permission for late filing - Request failing to include complete representations or any submissions which responding party did not have opportunity to raise at hearing preceding decision - Reconsideration application denied**

**BEFORE:** *Robert D. Howe*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

**DECISION OF THE BOARD;** April 26, 1993

1. In a decision dated February 23, 1993 regarding this referral of a grievance to arbitration under section 126 of the *Labour Relations Act*, the Board awarded the following remedies:

7. For the foregoing reasons, the Board, pursuant to section 126 of the *Labour Relations Act*, hereby declares that the responding party is bound by the current Ontario Erectors Association Collective Agreement with the International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario comprised of Local Unions 700, 721, 736, 759, 765, and 786; and further declares that the responding party has violated that Collective Agreement in the manner described above. To remedy those violations of the Collective Agreement, the Board hereby orders that the responding party pay to the applicant forthwith damages in the amount of \$16,298.10.

2. On March 31, 1993, the Board received the following letter dated March 29, 1993:

Ontario Labour Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

Attention: Mrs. T. A. Innis, Registrar

Dear Madam:

Re: Mohawk Services ats Ironworkers, Local 721 - OLRB File No. 3068-92-G

On February 23rd, 1993 a panel of the Board chaired by Mr. Robert D. Howe rendered a decision in which the panel directed Mohawk Services to pay damages in the sum of \$16,298.10. Ms. Deborah Doxtator represented Mohawk Services. Mr. Gary Caroline represented the applicant.

Ms. Doxtator has instructed us to make an application for reconsideration under s.108(1) of the Ontario Labour Relations Act. She alleges that the amount of damages awarded is wrong and that the value of the contract in question was considerably less. Accordingly, the damages should have been considerably less. I have asked Ms. Doxtator to provide me with the appropriate documents for my review and submission to Mr. Caroline and the Board.

Please regard this letter as the Respondent's application for reconsideration.

Yours very truly,  
SIMPSON, WIGLE

"John M. Wigle"

John M. Wigle

3. Mr. Wigle also forwarded a copy of that letter to his client and to counsel for the applicant, who wrote to the Board as follows in a letter faxed to the Board on April 7, 1993:

Ms. T. A. Inniss  
Registrar  
Ontario Labour Relations Board  
400 University Avenue  
Toronto, Ontario  
M7A 1V4

Dear Ms. Inniss:

RE: Iron Workers, Local 721 v. Mohawk Services  
OLRB File No.3068-92-G

We are in receipt of a letter addressed to you by counsel for the responding party in the above noted Referral of Grievance to Arbitration.

The applicant opposes the responding party's Request for Reconsideration on the following grounds.

- i) This request for consideration has been filed beyond the time limits established for such matters in the Board's Rules of Procedure. Furthermore, it has not presented any reason or submission to the Board with respect to why it should exercise its discretion and entertain this Request beyond the 30 day time limit.
- ii) With respect to the merits of this Reconsideration, we submit that the responding party has not pleaded sufficient facts and material for the Board to even entertain such a request.

- iii) The responding party in the person of its owner was present and participated in the hearing of this grievance. Specifically, she was present while the applicant led evidence on the issue of the quantum of damages. She was given an opportunity to cross examine the applicant's witness. Furthermore, the responding party declined to call any evidence with respect to this issue. While the responding party may be disappointed with the outcome, there are absolutely no reasons either pleaded or evident which would justify the Board reconsidering its decision.
- iv) The applicant requests that the responding party's Request for Reconsideration be dismissed.

Yours truly,

"Gary Caroline"

Gary Caroline

4. In a letter dated March 29, 1993, which was received by the Board on April 13, 1993, Mr. Wigle expressed the view that "any decision by the Board regarding [Mr. Caroline's] motion for dismissal of the application would be premature and unfair."

5. Subsection 108(1) of the *Labour Relations Act* provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

6. Also material to the disposition of this matter are the following rules contained in the Board's new Rules of Procedure, which came into force on January 1, 1993:

#### Forms and Practice Notes

- 4. The Board may set the forms to be used in its cases, and may change those forms from time to time. Copies of the forms may be obtained from the Board's office in Toronto.

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#### Filing and Delivery

- 6. All filings with the Board must be made in the proper form, if any, and in the way required by these Rules.

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#### Requests for Reconsideration

- 83. A request for reconsideration under subsection 108(1) of the Act must include complete written representations in support of the request.

• • • •

- 85. No request for reconsideration will be considered where it is filed thirty (30) or more days after the date of the Board's decision, except with the permission of the Board.

7. Pursuant to Rule 4, the Board has set Form A-47 as the form to be used in filing a

request for reconsideration under subsection 108(1) of the Act. The responding party has not used that form. Moreover, its request for reconsideration fails to comply with the requirements of the Rules in a number of other material respects. It was not filed within the period specified in Rule 85, and contains nothing which would prompt the Board to grant permission for late filing. It also fails to include complete written representations in support of the request for reconsideration. Moreover, it does not contain any representations or submissions which the responding party did not have an opportunity to raise at the hearing of this matter which preceded the aforementioned decision.

8. For the foregoing reasons, the responding party's application for reconsideration is hereby denied.

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**3152-92-M International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W., Applicant v. Morrison Meat Packers Ltd., Responding Party**

**Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Union making complaint in October 1992 alleging that employees unlawfully discharged for union activity - Hearing in discharge complaint commencing in December 1992 and continuing on dates in February, April and May 1993 - Union filing application in February 1993 seeking interim reinstatement of employees pending final determination of complaint - Assuming truth of allegations, complaint making out arguable case for remedies sought - Board weighing relative labour relations harm resulting from granting or not granting interim order sought and declining to order interim relief - Delay militating against granting interim relief - Board not persuaded that interim order power ought to be used to limit or avoid harm which is purely financial - Application dismissed**

**BEFORE:** *Bram Herlich, Vice-Chair, and Board Members W. H. Wightman and E. G. Theobald.*

**APPEARANCES:** *Elizabeth M. Mitchell, Don Caryn, Leslie Cook, Fred Jepson, Terry Hartman and Bill Butler for the applicant; Ian S. Campbell and Ron Dancey for the responding party.*

**DECISION OF THE BOARD;** April 14, 1993

1. This is an application for an interim order filed pursuant to section 92.1 of the *Labour Relations Act* which, by decision dated February 15, 1993, was denied. These are the reasons for that denial.

2. This matter relates to Board File 2159-92-U (the "main application") in which the applicant (also referred to as the "union") alleges that the responding party (also referred to as the "company" or the "employer") has violated various sections of the Act. In the main application the union seeks, among other things, the reinstatement of three grievors it asserts were discharged contrary to the Act. In the present case the union seeks an interim order reinstating those grievors pending a final determination in the main application.

3. The discharges in question occurred on October 21 and 22, 1992. Also on October 22, 1992, the union filed a certification application in respect of the bargaining unit from which the

grievors were discharged (the union was certified in respect of that bargaining unit by a decision of the Board (differently constituted) dated November 23, 1992 in Board File 2148-92-R). The main application was filed on October 27, 1992; the present application was filed on February 2, 1993.

4. This panel of the Board commenced hearing the main application on December 14, 1992. That hearing continued, subsequent to the denial of the present application, on dates in February and April, 1993 and is scheduled to continue further on dates which will, if necessary, run into May of this year.

5. The facts alleged and relied upon by the union emerge from its filings (including the declarations executed by each of the grievors) and can be briefly summarized as follows.

6. The grievor Hartman commenced employment with the company in June, 1992. During the month of October he supported the union's organizing campaign and solicited membership evidence among fellow employees in an open and public manner. On October 22, 1992 Mr. Tiller, the employer's general manager, handed him a letter dated the previous day advising him that his services were no longer required and promising him 5 days' pay in lieu of notice. Mr. Hartman acknowledges that he had occasionally been late or had missed work but asserts that he had never been disciplined or warned in any way that his employment was in jeopardy. Mr. Hartman, since his discharge, has been receiving Unemployment Insurance benefits ("UI") but because of his financial obligations which include child support, mortgage and car payments has been forced to deplete his savings and most of his RRSP plan. However, his second wife, who has not worked for the last year, has recently started a new job.

7. The grievor Jepson commenced his employment with the company in mid-January, 1992. In October of 1992 he supported the union's organizing campaign by soliciting support and collecting membership evidence from fellow employees. Mr. Jepson had two significant periods of absence due to work related injuries. On his return from the second of these on October 19, 1992, his supervisor, Ben van den Berg, questioned him about union activity. The following day he was discharged for allegedly having too many sick days (apart from absences due to work related injuries). Five days' pay were received in lieu of notice. He had never been warned that his employment was in jeopardy for absenteeism. He has been the sole wage earner for his wife and three young children although his wife is currently looking for work with fairly limited success. Since his discharge he has been receiving UI as well as a welfare supplement. He is one month behind in his rent and is concerned about the stress and tension of his current situation.

8. The grievor Butler most recently commenced his employment with the company in August of 1992. During a previous two year period of employment with the company, he served as president of the prior certified bargaining agent. In October of 1992 he supported the union's organizing campaign. On October 22, 1992 he was discharged for two incidents which had occurred the previous day. The union asserts that these incidents either do not properly give rise to discipline or involve rules the violation of which have not previously given rise to discipline. Mr. Butler was not previously disciplined or warned that his employment was at risk. Since his discharge, Mr. Butler has been unable to secure employment and has been in receipt of welfare benefits.

9. The facts alleged and relied upon by the employer emerge from its filings (including the declaration executed by David Tiller) and can be briefly summarized as follows. There was just cause for the discharges of each of the grievors and none of these discharges was tainted by anti-union animus. While the union has failed to establish that any harm will occur if the order sought is not granted, the employer may suffer substantial harm if it is. Aside from the more obvious harm resulting from an interference in the employer's management of its operations, the particular circumstances of this case may give rise to more specific harm. Since the discharges in October of

1992, the employer has hired new employees to perform the work previously performed by the grievors. If the interim relief were granted the employer would be unlikely to retain those new employees. Further, if the main application were ultimately dismissed, the employer would, in all likelihood, lose the possibility of continuing the employment of the new employees who may well make alternate arrangements in the interim.

10. Section 92.1(1) of the Act provides:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

11. In support of their respective positions, the parties referred us to numerous authorities including *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All ER 504 (H. of L.); *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505 (Div. Ct.); *Ticketnet Corporation v. Air Canada*; *Air Canada v. A.M.R. Corporation et al.* (1987), 21 C.P.C. (2d) 38 (Ont. Sup. Ct.); *Taylor v. Atkinson et al.* (1984), 6 C.C.E.L. 112 (Ont. Sup. Ct.); *White Spot Restaurants Limited*, [1988] BCIRCD C274 (October 14, 1988); *Western Canada Steel Limited* (1989), 6 CLRBR (2d) 123 (British Columbia Industrial Relations Council); *International Association of Machinists and Aerospace Workers, members of District Lodge 721 et al. v. Canadian Airlines International Ltd.*, 92 CLLC 14,016 (B.C. Sup. Ct.); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Companies Inc.* 92 CLLC 16,042 (Sask. L.R.B.); and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. WaterGroup Canada Limited and Aquafine Water Inc., Regina, Saskatchewan*, unreported decision of the Sask. L.R.B. File No. 197-92, August 25, 1992.

12. We have found the submissions and authorities provided to be extremely helpful in assisting the Board in beginning to shape the parameters of the exercise of its recently conferred discretionary powers under section 92.1. The authorities relied upon were not included or adverted to in the materials filed prior to the hearing but rather were filed with the Board at the hearing held in this matter. Pursuant to sections 104(14) and (14.2), rules have been made in relation to applications for interim orders (see Rules 86-93 of the Board's Rules of Procedure). In particular, Rule 93 provides that the Board may decide such an application without an oral hearing. It should come as no surprise that the Board may be more likely to hold a hearing with respect to at least the first applications made under section 92.1. Conversely, as the parameters of the exercise of the Board's discretion begin to develop some clarity and predictability, the Board may well become more inclined, having regard to the need for expedition in any given case, to dispose of such applications without a hearing. Parties who decline to include (or at least refer to) the authorities upon which they rely in the materials they file pursuant to the Rules run the risk that such authorities may not come to the Board's attention in cases where it is satisfied that the matter can be disposed of on the basis of the material filed and without an oral hearing.

13. The employer urged us to view the interim relief being sought as an extraordinary remedy which should not be lightly granted. The approaches and tests traditionally adopted and applied by the courts in cases where interim or interlocutory injunctions are sought ought to be considered. And while it relied on some similar types of decisions of the courts in various contexts, the union urged us to adopt an approach which specifically considered and incorporated the objects of the Act. Thus, the employer argued that we should follow the courts' approach and follow a three step procedure involving an evaluation of the apparent merits of the main application, an examination of what, if any, irreparable harm might result and for which damages would be an inadequate remedy and, finally, an assessment of the balance of convenience. The union, on the other hand, suggested we ask whether granting the relief would further the objects of the statute

and that we proceed to consider some of the more labour relations specific tests adopted by some of our sister tribunals in administering comparable legislative provisions.

14. While the approach and experience of the courts in dealing with temporary injunctions may be useful, at least by analogy, for the purposes of articulating the kind of inquiry the Board performs in adjudicating applications for interim orders, we are of the view that it would be inappropriate to rigidly adopt that approach and mechanically apply it to the unique kinds of labour relations problems with which this Board must deal. Thus, for example, we find the employer's reliance on the distinction between mandatory and prohibitory injunctions (and the stricter standards which may be applied in the former cases) to be of little value in the labour relations context. Labour relations involve a fluid and ever shifting landscape and any attempt to characterize the particular relief being sought as the equivalent of a mandatory rather than a prohibitive injunction may be subject to fortuitous circumstances capable of significant change from one day to the next. Should the Board adopt a different standard depending on whether a union seeks to restrain an employer from implementing the announced lay off of a union organizer or, alternatively, seeks, say a day later, to have the laid off organizer returned to work? More telling, perhaps, is the fundamental difference between the nature of relief commonly available and granted in the courts as opposed to the typical remedial response that the labour relations community has come to expect from the Board (or even from labour arbitrators). While relief like temporary mandatory injunctions or specific performance is indeed rare in the courts, the labour relations equivalent remedy of reinstatement to employment is part of the daily diet of this Board. We are consequently of the view that extreme caution ought to be exercised in respect of any attempt to transplant approaches or jurisprudence from the courts to this Board.

15. Having sounded this warning, however, it is also clear that portions of the established court approach may be appropriately adapted to fit the labour relations context. The parties did not seriously dispute that an applicant for an interim order could well expect the Board to perform some assessment of the apparent merits of the main application. Indeed, the cases relied upon, whether decisions of the courts or of specialized labour relations tribunals, all indicate this. They differ, however, as to the nature of the standard to be applied, positing standards which range from insuring that the claim is not frivolous or vexatious to requiring a strong *prima facie* case. Before this Board determines where on this continuum it should locate this aspect of any test for granting interim orders, it is useful to consider the purpose and nature of these types of proceedings. We cannot lose sight of the fact that interim relief is **interim** - it is not a remedial response to any violation of the Act. There will be no remedial or other response unless and until the Board makes a finding in the main application that the Act has been violated or that other circumstances warranting a remedial or other response have been established. In this respect interim orders under section 92.1 are readily distinguishable from what is commonly referred to as "interim certification" under section 6(2) of the Act. In the latter case the Board must be satisfied as to the applicant's ultimate success in its certification application. Apart from determining what the Board "considers appropriate", there are no equivalent legislative preconditions to the exercise of the Board's discretionary power to make interim orders under section 92.1. An interim order represents, in part, an evaluation by the Board, in the face of a conflict and in response to a request by one of the parties, as to the preferred labour relations circumstances to be preserved or created during the course of the litigation of the main application. This evaluation must be capable of expeditious application and be responsive to developments which may be dramatic. To the extent that the amount of time between events giving rise to requests for interim orders and the Board's disposition of those requests can be minimized so too will any undesirable disruptive effects of Board intervention be lessened. The Board's power to grant interim orders will serve to minimize the negative effects or potential serious harm that may result from the passage of time associated with the litigation of the main application.

16. In this context it is hardly surprising that there are significant differences in the conduct of these types of proceedings. The most obvious difference is that oral hearings need not be held in these cases. Further, given the premium attached to expedition, even in cases where a hearing is held the Board is unlikely to entertain *viva voce* evidence. And while the parties are required to file declarations detailing all of the facts relied upon and signed by persons with first-hand knowledge, the rules contemplate no opportunity for cross-examination of the declarants. These procedures are consistent with the need for expedition and the fact that no final determinations are made in these types of proceedings. In this context the Board is obviously unlikely to arrive at any firm conclusions regarding the merits of the main application - at best it can only draw some conclusion about the apparent nature of that application. Thus, it appears to us that the most appropriate fashion for the Board to evaluate the apparent merits of the main application should resemble that in which the Board makes determinations under (both the former section 71(1) and the current) Rule 24 of the Board's Rules of Procedure which reads, in part:

Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing...

In other words, unless the Board is satisfied that, assuming the truth of all the facts relied upon by the applicant, an arguable case for the orders or remedies sought in the main application is made out, the applicant's request for an interim order will not be granted. To the extent that an applicant's apparent case in the main application may be capable of meeting a more rigorous standard, that may be a factor which the Board will possibly consider in determining whether or not to grant the interim order sought.

17. In the present case, although the parties disputed whether the applicant had met any such higher standard, it was not seriously disputed that, assuming the truth of the union's allegations, the application made out an arguable case for the orders or remedies sought in the main application.

18. In considering the authorities cited to us, the submissions of the parties, and the nature of the relief sought, we are satisfied that perhaps the most significant factor the Board must weigh will be the relative labour relations harm which could result from granting or not granting the interim order sought. There must be some danger of possible significant harm to the applicant before the Board will grant the relief being sought. Furthermore that harm must be more significant than the possible harm which may result to the responding party if the order sought is granted.

19. A further factor which the Board may consider is expedition from at least two perspectives. There is no statutory time limit with respect to the bringing of an application for an interim order. However, given the emphasis placed on expedition in both the statute and the rules (the present matter came on for hearing within 5 days of the filing of the application), the Board will expect applications under section 92.1 to be filed in extremely close proximity of the events giving rise to the application. An applicant who delays undermines its own ability to convince the Board of any urgent or pressing need for interim relief. Perhaps more important, however, as the passage of time between the events giving rise to the request and its determination increases so too does the Board's ability to quickly intervene decrease. Furthermore, and at least to the extent that granting an interim order interferes with an employer's management of its enterprise, the length of time during which an employer's action has been implemented may easily impact on the harm consequent from any Board order effectively undoing that measure, even on an interim basis.

20. Of all of the factors adverted to, we now consider those which we view as most relevant to the particular circumstances of the present application.

21. There are two aspects of the harm the union seeks to avert which we find troublesome. This Board has always been sensitive to the economic vulnerability of employees and the consequent damage that can be done to a union's legitimate interests through unlawful employer actions directed at individual employees. The Board's sensitivity has been particularly acute during the period of time during which a union seeks to establish its legitimacy and obtain bargaining rights in respect of a particular workplace. Indeed, recent changes to the Act recognize (in section 92.2) the "period beginning with a trade union's organizing activities and ending with the disposition of its application for certification" as one during which certain alleged violations of the Act must, on the request of the union, be dealt with on an expedited basis. In the present case, however, we find ourselves beyond the organizing period - the union had been certified some two and a half months prior to filing the present application. Whatever the impact of the discharges may have been on the applicant at the time they occurred, the situation, at least as of the date of filing the present application, is now different. And while the union argued that employees may be reluctant to fully participate in union activities without fear of retaliation so long as the grievors are discharged, there is clearly no allegation or suggestion that the very existence of the union's bargaining rights is threatened, as it might be were the organizing campaign still ongoing. Neither did any of the material included in the declarations filed by the applicant suggest that the union has or will suffer any harm in relation to its ongoing collective bargaining activities.

22. It is of note that the Saskatchewan Labour Relations Board, in granting the relief sought in the *WaterGroup Canada Limited and Aquafine Water Inc.* case, *supra*, observed at page 6 as follows:

It is critical to our decision to grant the injunctive order in this case that the collective bargaining relationship between these parties is at an early and fragile stage. Though the union has succeeded in obtaining the right to represent these employees, it has yet to demonstrate that its representation will have any positive effect. It has yet to reach any agreement with the Employer on any of the range of issues which may be of concern to members of the bargaining unit.

We have little difficulty accepting that, as a general matter, during the course of negotiations for a first collective agreement, a collective bargaining relationship can be described as early and fragile. We doubt, however, that the fact that interim relief is sought during this period will invariably militate in favour of it being granted. One cannot help but notice that in the Saskatchewan decision there was a clear and unmistakable nexus between the union's lack of opportunity to yet demonstrate the positive effects of collective bargaining and the alleged violation of, among others, freeze provisions when the employer announced its intention to unilaterally implement a reorganization resulting in several layoffs.

23. In any event, the union relied most heavily on the harm it claimed could result for the three grievors in the event they were not reinstated. The declarations executed by each of the grievors indicated that they are each, to perhaps varying degrees, currently suffering financial hardships as a result of their continuing unemployment. It was not disputed that it was appropriate for the Board to consider the potential harm to the grievors in determining the present application. And while we may have serious doubts that reinstatement and damages can entirely repair the harm suffered during a period of unemployment resulting from an unlawful discharge, we are satisfied that the harm the applicant seeks to avoid in relation to the grievors in this case is primarily, if not exclusively, financial in nature. We are not persuaded that the Board ought to intervene and use its power to grant interim orders to avoid or limit harm which is purely financial. Furthermore, while the potential cumulative effect of ongoing financial difficulty may transform the harm being suffered into something greater than the sum of its parts, we would hope that the Board's new abilities and procedures to enhance the expeditious resolution of matters, will make such a possibility

remote in the context of matters brought before the Board. In the present case while the grievors have been suffering the consequences of their discharges since October of last year, the period that is relevant for our purposes is that between the filing of the present complaint and the ultimate resolution of the main application, a period which will likely be in the range of three months. We are not persuaded that length of delay is sufficient to transform the essentially purely financial nature of the harm involved.

24. We are also concerned with the dual aspect of delay in this case. The present application could have been filed approximately one month earlier than it was. Without deciding whether the Board would decline to entertain an application simply on the basis of a one month delay in filing, we are concerned about that amount of delay in this case, although that concern is perhaps alleviated by the fact that the measure of when this application might have been filed is the day on which recent changes to the Act became effective. Of greater concern to us is the passage of time for which no blame can be attributed to the union since it results, essentially, from the fact that interim relief was not available at the time of the grievors' discharges in October of last year. However, that passage of time, even if not the fault of any of the parties, precludes any possibility of the Board intervening in a timely fashion, i.e. virtually simultaneously with the events giving rise to the main application. It provides added force to the employer's concern about the possible effects of an interim order since the employer may lose the services of employees who have already been at work for several months and that loss may be irrevocable even if the employer succeeds in the main application. So while the union argued that the anticipated delay between the discharges and their ultimate resolution is a factor which militates in favour of granting interim relief, we are of the view that the passage of time during at least a portion of that period in fact militates against granting interim relief. While the union may properly point to the delay between filing the present application and the disposition of the main application, the likely greater delay from the date of the discharges to the date of filing the present application (even though only part of this period of delay is directly attributable to the union) in fact militates against the granting of interim relief since it hampers the Board's ability to intervene in a timely fashion and consequently minimize the harm to the employer consequent on the intervention.

25. It was in view of all of the factors adverted to and, in particular, having regard to our assessment of the relative harm which may be suffered by the employees, the union and the employer, an assessment which, in the circumstances of this case, included considerations related to the timing of the application and our concerns regarding the various aspects of delay or passage of time in this case that we decided not to grant the interim order sought.

26. Subsequent to the hearing in the present matter, decisions of other panels of the Board have issued (as yet unreported decisions) in *810048 Ontario Limited c.o.b. as Loeb Highland* (March 12, 1993; Board File No. 2912-92-M) [now reported at [1993] OLRB Rep. Mar. 197]; *Reynolds-Lemmerz Industries*, (March 15, 1993; Board File No. 3207-92-M) [now reported at [1993] OLRB Rep. Mar. 242]; and *Metropolitan Toronto Apartment Builders Association*, (March 15, 1993; Board File No. 3164-92-M) [now reported at [1993] OLRB Rep. Mar. 219]. Although these decisions were obviously not available to the present parties and were not relied on in determining the present application, we note that we see nothing inconsistent as between the present decision and those just referred to.

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**3322-92-R United Steelworkers of America, Applicant v. National Protective Service Company Limited, Responding Party**

**Certification - Constitutional Law - Security Guard - Employer in business of providing security services to various clients, including various departments and agencies of the federal government - Security service duties including controlling movement of people and material into and out of federal government buildings, reporting suspicious persons, preventing fires, enforcing fire safety standards and administering first aid - Board not persuaded that security services provided integral to core federal undertaking - Board assuming jurisdiction to consider certification application - Certificate issuing**

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

**APPEARANCES:** *M. Kelly*, *B. Jones*, *D. McRae* and *S. Deans* for the applicant; *B. Sevigny* and *T. Shearly* for the responding party.

**DECISION OF THE BOARD; April 30, 1993**

1. The style of cause is hereby amended to reflect the correct name of the responding party: "National Protective Service Company Limited".

2. This is an application for certification. Prior to the hearing scheduled in this matter the parties met with a Labour Relations Officer to review the issues in dispute. Following that meeting there remained essentially two issues. First, the responding party ("N.P.S." or "National Protective Service" or "the employer") takes the position that this Board has no jurisdiction over the employees that are subject to the application. The second issue is with respect to the bargaining unit description.

3. The hearing convened before this panel dealt with the first issue. It is the position of the responding party that this Board lacks the constitutional jurisdiction to certify its employees. It is the position of the applicant (or "the union") that constitutional jurisdiction is properly vested within the provincial jurisdiction.

4. The parties provided the panel with an Agreed Statement of Facts as follows:

1. The respondent is in the business of providing security guard services in the Regional Municipality of Ottawa-Carleton, and in Hull, Quebec. It was incorporated in Ontario and is licensed under the *Private Investigators and Securities Guards Act*, R.S.O. 1990, ch. P-25, as well as under similar legislation in the Province of Quebec. As of February 12, 1993, the date of the within application, the respondent had a total of approximately 300 persons on its payroll, 245 of whom were security guards employed on a full-time basis, and 45 of whom were security guards employed on a part-time basis.
2. During January of 1993, the respondent provided a total of 50,881 hours of security guard services in the Regional Municipality of Ottawa-Carleton. About 90% of those hours were provided to various departments and agencies of the Federal Government, including Revenue Canada, Transport Canada, Public Works Canada, Environment Canada and Agriculture Canada. The remaining 10% of those hours were provided to other clients such as the City of Ottawa, the Regional Municipality of Ottawa-Carleton and Ottawa Commercial Realities. The number of hours of security guard services provided by the respondent to clients other than the Federal Government in January of 1993 was significantly higher than the respondent's average monthly total for non-Federal Government clients, as the respondent provides secu-

rity guard services for a number of non-Federal Government snow dumps during the winter months only. Over the entire year, the Federal Government and its departments and agencies account for between 90% and 97% of the respondent's business.

3. There is no regular rotation of security guards from location to location. However, security guards who work at Federal Government sites are occasionally offered opportunities to work overtime at non-governmental locations. Conversely, security guards who generally work at sites operated by clients other than the Federal Government are occasionally assigned to work at Federal Government sites when the need arises. Approximately 5% of security guard employees do not meet the requirements of the RMSO and cannot be assigned to Federal sites.
4. With the exception of pre-board passenger screening services provided to the Department of National Defence at its Canadian Forces Base in Ottawa, and security services provided to the National Printing Bureau in Hull, guard services at Federal Government sites in Ottawa-Carleton are provided pursuant to a detailed, written standing offer agreement for the provision of security guard services at departments and agencies of the Federal Government. That agreement is entitled the "Regional Master Standing Offer" ("RMSO"), and consists of a 94 page contract in a form prepared by the Department of Supply and Services ("DSS"). Space at a few of the locations at which the respondent provides security guard services to Public Works Canada is leased by the Federal Government to private tenants. A few of the other locations include both Federal Government offices and offices of other entities.
5. The RMSO sets forth detailed provisions relating to the duties, responsibilities and terms and conditions of employment of the company guards. The essential features of the RMSO can be summarized as follows:
6. The RMSO sets forth specific and detailed criteria with respect to health, training, appearance, licensing and identification, bonding, age, education, citizenship, language, experience, security clearances and reliability checks with which the company employees must comply. The RMSO requires that security guards are licensed in accordance with the *Private Investigators and Security Guards Act of Ontario* and Regulations. Job specifications are also set forth in the RMSO. They contain general statements of the duties which National Protective employees must perform and to which the company must agree. The duties are set forth in detail and grouped according to classification.
7. Common duties undertaken by National Protective employees at Federal Government sites include controlling the movement of people and material into and out of the Federal Government buildings, reporting suspicious persons, administering first aid, preventing fires, enforcing fire safety standards, searching for and identifying suspect items such as bombs or other threat situations, providing evacuation leadership in fire, bomb or other threat situations, reporting incidents to the federal authorities and arresting any person in appropriate circumstances.
8. A sample of additional responsibilities which some classifications might be requested to undertake include the following:
  - (a) cleaning escort - prevention of theft of classified materials from government offices (garbage or otherwise) by accompanying cleaning staff while the latter perform their duties. In some departments, waste paper may be marked "Top Secret" and the guards must ensure that such waste is not removed by the cleaners.
  - (b) non-public guard or patrol person - ensures that only authorized articles are removed from a building, that perimeter and restricted areas are secure and issues passes as required to control the movement of people, material and vehicles.

- (c) farm patrol - carries out motorized patrol at the Central Experimental Farm.
  - (d) public guard - regulates the flow of public visitors into and from the federal government premises, prevents the entry into the premises of unauthorized packages, monitors and controls movement of government property, and controls movement of personnel in restricted areas.
  - (e) information desk, access control or receptionist - regulates the flow of materials and people into and out of federal government premises to prevent unauthorized removal of entry of material or persons.
  - (f) console operator and voice communicator - logs all phone calls and radio messages, maintains a list of staff entering premises after normal working hours, advises the appropriate government office of important calls, monitors building security, identifies and responds to alarms and acts with outside agencies in alarm situations.
  - (g) senior guard or shift supervisor - may be required to carry out guard duties in sensitive areas (i.e. the guarding of illegal drugs, employment and taxation buildings), restricted areas and high profile areas (i.e. offices of senior department officials).
9. The RMSO also sets out the details of a Basic Training Program which all of National Protective's employees engaged at Federal Government sites must take and pass to ensure that they are able to perform the above mentioned duties and functions. Similarly, the RMSO set out the details of a supervisory Training Program which National Protective's guards must successfully complete before undertaking supervisory functions. The RMSO also provides that DSS officials will administer, prior to guard assignment, a test to the proposed security guard personnel in order to evaluate their job knowledge and skill. The RMSO also requires National Protective to employ "patrol officers" to monitor the guards at the various Federal Government sites, and to report deficiencies in employee conduct.
  10. In addition, the RMSO provides that the Federal Government may conduct on-the-job inspections of National Protective's employees to ensure adequate job performance. Where deficiencies in job performance are not rectified by National Protective, it may be considered grounds for default.
  11. In addition to the control conferred on it by the RMSO, DSS employs a "Guard Quality Assurance Unit" ("GQA"), which inspects the quality of guard services provided by National Protective at each and every shift. That unit may advise the federal government of deficiencies in work performed by National Protective employees, by completing and filing deficiency reports, copies of which go to the contracting authority, NPS head office and to the department client. No such quality assurance units monitor NPS's non-federal government sites.
  12. National Protective also provides security guard services to Public Works Canada at National Printing Bureau, a federal government complex in Hull, Quebec. That contract for services is the same as RMSO except for some additional services and requirements.
  13. With regard to the contract to provide guard services to the Department of National Defence at its Canadian Forces Base in Ottawa, it is governed by a separate contract between DSS and National Protective. Under that contract, security guards must be trained to conduct pre-board security checks. The guards working at the Base are assigned to that contract on a permanent basis. Presently, the following guards are assigned to that contract: Simon Black (Schedule "A", No. 19), Sean Doucet (Schedule "B", No. 14), Andy Giraud (Schedule "A", No. 63), Sheila Hiscock (Schedule "B", No. 20), Micheline Letch (Schedule "A", No. 98) and Lesley-Ann McLellan (Schedule "A", No. 114). These employees are agreed out of the bargaining unit.

14. The parties agree that the respondent will call Tim Shearly to give evidence regarding paragraphs 6, 8, 9 and 13 only. The applicant will then have an opportunity to call evidence on paragraphs 6, 8, 9 and 13 only. No further evidence will be called by either party.

5. That statement of fact was supplemented by the introduction of the document referred to in paragraph 4, the "RMSO", and the *viva voce* evidence of Mr. Tim Shearly, the Vice-President of N.P.S. In his evidence in chief Mr. Shearly reviewed the RMSO for the purpose of highlighting the specificity and the high standards required by the federal government. Many of the specific and detailed criteria required of its security guards, and the extent of overseeing by the client of the service being provided are unique to the federal government. In cross-examination Mr. Shearly acknowledged that the RMSO represented N.P.S.'s contractual obligations entered into pursuant to a request by the federal government to provide security services. The failure to meet these requirements would constitute grounds for default on the contract and the contracting federal agency or department can make deductions from National Protective Service's invoice to account for those deficiencies. Although not explicit in his testimony, it is reasonable to infer that if these deficiencies were of a magnitude so as to represent sub-standard service to the federal agency or department, it would have the opportunity to discontinue contracting with National Protective Service for the provision of security services.

6. With the exception of the contracts for guard services to the Department of National Defence (D.N.D.) and the National Printing Bureau in Hull, all of N.P.S.'s other contractual relations flow pursuant to "call-ups" which essentially constitute a tender incorporating the requirements of the RMSO. Once signed by National Protective Service, a call-up and the requirements of the RMSO constitute the contract between the federal government department or agency involved and National Protective Service.

7. While these facts are fairly straightforward the issue of their appropriate constitutional characterization and the labour relations consequences has not been. In 1987 the United Plant Guard Workers' of America brought an application for certification for employees of National Protective Service. The bargaining unit sought in that application was, in most respects, the same as that proposed before us. That earlier application however also included employees employed in the provision of pre-board passenger screening services on behalf of the Department of National Defence at its Canadian Forces Base in Ottawa. In this application the parties have specifically agreed that those employees are properly excluded from the bargaining unit. The parties here are also agreed that employees performing security services in Hull, Quebec, pursuant to the separate contract with the National Printing Bureau are also not the subject of this application.

8. In the 1987 case (cited as *National Protective Service Company Limited*, [1987] OLRB Rep. Feb. 245), a panel of this Board ("the OLRB") dismissed that application for certification concluding that the employees of N.P.S. were appropriately within the federal jurisdiction.

9. In June 1988, following the release of the decision of the OLRB, the Canadian Guards Association filed an application for certification before the Canada Labour Relations Board (the "CLRB") for essentially the same group of employees of N.P.S. Dealt with at the same time were applications regarding employees of Pinkertons of Canada Ltd. All the parties before the CLRB were in agreement that that Board had jurisdiction over the employees in question. However, the CLRB raised and sought the evidence and submissions of those parties on the issue of whether the employees in question were properly the subject of federal or provincial jurisdiction.

10. In the meantime, in 1989, the CLRB released its decision in *Burns International Security Services Limited et. al. and Canadian Union of Postal Workers et. al.*, 3 CLRBR (2d) 264 (the

"Burns" case). At issue was whether or not Canada Post Corporation ("CPC") had sold part of its business to Burns International Security Services Limited ("Burns") by contracting out security services at certain postal facilities in Ontario. As a preliminary issue the CLRB considered whether or not both the alleged vendor and purchaser fell within the federal jurisdiction and consequently within the jurisdiction of that Board. In concluding that the operations performed by Burns at the CPC facilities were within the provincial jurisdiction, the CLRB reviewed a number of the same cases set out in the 1987 OLRB decision, including the decision of the Supreme Court of Canada in *Northern Telecom Ltd. v. Communication Workers of Canada et. al.*, (1979), 98 D.L.R. (3d) 1 which approved the reasoning in *Arrow Transfer Company Ltd.*, 74 CLLC 16,130, a decision of the British Columbia Labour Relations Board. In addition the CLRB considered the decision of the Federal Court of Appeal in *C.A.L.E.A. v. Wardair Canada (1975) Ltd.*, [1979] 2. F.C. 91, 97 D.L.R. (3d) 38.

11. In August, 1990 the CLRB released its decision concerning the employees of N.P.S. and Pinkertons (*Canadian Guards Association v. National Protective Service Company Limited* Board File 555-2816, unreported decision of the CLRB, August 29, 1990). It reviewed the 1987 decision of the OLRB and while agreeing with its conclusion regarding employees involved in pre-board screening services for D.N.D it expressly disagreed with the OLRB's conclusion regarding the other employees. Following a lengthy review of a number of decisions of the Supreme Court of Canada and the Federal Court of Appeal and other CLRB jurisprudence, including the *Burns* decision, that Board concluded that the employees in question properly fell within the provincial jurisdiction and dismissed the applications for certification.

12. The applicant in those proceedings took that decision on review before the Federal Court of Appeal. By endorsement dated March 31, 1992 that Court dismissed the application stating:

While we are unable to agree entirely with the lengthy reasons of the Canada Labour Relations Board, we are of the opinion that it reached the correct result. It found that the employees of National Protective Services engaged in airport security functions at CFB Ottawa are engaged in a federal undertaking. That decision is not questioned in this proceeding.

Is also found that the other employees of N.P.S., and those of Pinkerton's were not engaged in a federal undertaking. We are satisfied that those employees are engaged in the undertakings of their respective employers: the provision of security services to a variety of clients. They are not engaged in the undertaking of the Government of Canada to which the services of a considerable majority of the employees in the proposed bargaining units are, in fact, provided.

13. The parties before us are agreed that the facts are essentially the same as those before both the OLRB in its earlier decision and the CLRB. While we are faced with conflicting conclusions we agree with the submission of N.P.S. to the effect that the nature of the constitutional question is fairly well settled. To use the words of the B.C. Labour Relations Board in *Arrow Transfer, supra*, we see the exercise as one of identifying firstly, the core federal undertaking in issue and then the particular subsidiary operation engaged in by the employees in question, in order to answer the question of whether the relationship of that subsidiary operation to the core federal undertaking can be characterized as vital, essential, or integral. The dispute in each case and before us concerns the result of the application of that approach to the facts.

14. The core federal undertaking involved in this case is identified only in paragraph 2 of the Agreed Statement of Facts, that is, various departments and agencies of the Federal Government, including Revenue Canada, Transport Canada, Public Works Canada, Environment Canada, and Agriculture Canada. The work performed by the subsidiary operation is outlined pri-

marily in paragraph 7 of the Statement of Facts with certain additional duties set out in paragraph 8.

15. In assessing what is integral to the core federal undertaking we note that the cases agree that providing pre-board screening services at the Canadian Forces Base in Ottawa is an integral part of a federal undertaking. The CLRB concluded that it is integral to the core federal undertaking of aeronautics, being a matter subject to regulation under the *Aeronautics Act*. The decision of the OLRB in 1987 also makes reference to the federal power specifically given under section 91(7) of the *Constitution Act* over “Militia, Military and Naval Service and Defence”. We reflect on the somewhat tenuous balance in these assessments, the fact that security services may be provided in accordance with prescribed regulation as opposed to a contractual standard being seemingly sufficient to render the subsidiary operation integral to the core federal undertaking. It may be that the fact of federal regulation provides some insight as to the degree to which the regulated activity is considered “essential” or “integral” to the associated federal undertaking. However, given the parties’ agreement before us, employees performing those functions are not in issue in this application.

16. In reviewing the 1987 decision of this Board we note that that panel’s primary concern appeared to be in relation to the group of employees performing work under contract to D.N.D. Finding that the other employees also fell with the federal sphere rendered a sensible labour relations result. The employer, employees and any bargaining agent would not be in the potentially burdensome and confusing situation of having to deal with at least two sets of rules governing their labour relations. This is particularly so where there was evidence that individual employees licensed in both Ontario and Quebec might well work in both of those jurisdictions, potentially subject to different terms and conditions of employment even while performing essentially the same work for the same employer.

17. In its submissions, the responding party accepts the principles enunciated in the cases set out in the CLRB decision but argues that its conclusion is incorrect on the facts. Counsel reviewed the decision in *Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 S.C.R. 754, considered by the CLRB, wherein Mr. Justice Beetz discussed the characterization of the subsidiary operation by considering the nature of the business as a “going concern”. In that case he concluded that the nature of the work, that being construction on an airport runway, a federal undertaking, did not change the ordinary business of the subsidiary operation, that being the business of construction.

18. In this case N.P.S argues that on the facts it must be concluded that the nature of the going concern of N.P.S is not just the provision of security guard services but the provision of security guard services to Federal Government undertakings, based on the percentage of the work performed for that client and the degree of control exercised over N.P.S in the performance of that work. N.P.S. asserts that the relationship between N.P.S and the Federal Government is both an extensive and continuing one. We note that that presupposes the successful delivery of the service to the client pursuant to the contractual obligation involved.

19. The essence of the responding party’s submission is that by virtue of the substantial degree of control established by the requirements in the RMSO leads to the inevitable conclusion that the security services provided constitute an integral part of the various federal undertakings. What is lacking in this analysis in our view is an assessment of the nature of the core federal undertaking involved. While the evidence is extremely limited it would appear to us that the core federal undertaking, for example, with respect to Revenue Canada is the exercise of taxation; with respect to Transport Canada, the regulation and facilitation of transportation and so on.

20. N.P.S. acknowledged that should we uphold this Board's earlier decision, given the CLRB's decision confirmed by the Federal Court of Appeal, these employees would find themselves in some kind of "constitutional limbo" but that that ought not to be a consideration in our determination. Surely, however, some element of certainty is warranted. The result of this constitutional confusion has been to considerably delay any opportunity for these employees to exercise their lawful rights to seek representation through a bargaining agent. The effect of adopting the employer's position would be to further delay that opportunity pending further resort to the courts.

21. We note that on the evidence before us we are unable to draw the conclusion that the various federal undertakings involved exercise sufficient control over the employment relationship so as to conclude that they are the employer for labour relations purposes, nor was that suggested by either party. While the RMSO establishes vigorous standards and criteria and the federal government exercises an inspection role, it is not at all apparent to the panel who exercises day-to-day control over the employees in terms of their continued employment nor how the terms and conditions of employment are set as between the individual employee and N.P.S. At the same time as asserting that the relationship between the federal undertaking and the subsidiary operation is a lengthy and continuing one, the responding party acknowledged in submissions that it is an arm's length relationship.

22. It no doubt would have been helpful to have some greater explanation from the Federal Court of Appeal with respect to its concerns regarding the reasoning of the CLRB. Its conclusion, however, even if we were to conclude that it was not binding on this Board, is certainly of considerable persuasive authority. We refer to that same court's comments in the *Wardair* case *supra*, wherein it commented:

A particular activity *may be reasonably incidental* to the operation of a federal work, undertaking or business *without being an essential component* of such operation. For example, an inter-provincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation.

(emphasis added)

The Court recognized that while an activity may well be "reasonably incidental" to the operation of a federal work, that does not, in and of itself, render it integral to the core federal undertaking.

23. In *Northern Telecom Canada Ltd. et. al. v. Communications Workers of Canada et. al.* (1983), 147 D.L.R. (3d) 1 (S.C.C.) (Northern Telecom #2) then Mr. Justice Dickson remarked on the nature of the constitutional assessment at hand. He concluded that the work of the installers in question was unlike the construction of a federal undertaking in that it was not preliminary to the work of the core federal undertaking (the operation of Bell Canada's telecommunications system). Mr. Justice Estey wrote that the almost complete integration of the installers' daily work routine with the task of establishing and operating the telecommunications network made the installers work an integral part of the federal work; that the installers' work was vital *in itself* to the continuous operation of the network.

24. In *Northern Telecom #2* the core federal undertaking could not function in the absence of the work of the installers. Can the same be said in this case? While it would no doubt create per-

haps significant difficulties, could the exercise of taxation, for example, not still occur in the absence of security services? It is interesting to note that Mr. Justice Dickson at least felt that the *Northern Telecom* case was "very close to the boundary line" but the Court was ultimately persuaded that the installers fell under federal jurisdiction. The relationship between the core federal undertaking and the subsidiary operation in this case is, in our view, more remote.

25. While we continue to have some reservations about the labour relations consequences, we have concluded on the basis of the authorities to which we were referred (including those not available to the Board in 1987), that while it may well be reasonably incidental to these federal undertakings that security services be provided we are not persuaded that they are integral to the core federal undertaking. Given the presumption that labour relations is a matter of provincial jurisdiction, on balance, we are persuaded that we have jurisdiction to deal with this application for certification.

26. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* (the "Act").

27. The remaining issue concerned the description of the bargaining unit. At the outset of the hearing the parties confirmed that their dispute with respect to the training officer was resolved. The parties are agreed that Training Officer is a position that is properly excluded from the bargaining unit. The parties were also in dispute as to whether Field Supervisors and Site Supervisors were properly included in or excluded from the bargaining unit. Following the hearing of the constitutional issue, we received a letter from the applicant dated March 17, 1993 enclosing a copy of Minutes of Settlement signed by the parties resolving any outstanding dispute on the bargaining unit description and the list of employees in the bargaining unit. Having regard therefore to the agreement of the parties both in writing and before the panel the Board finds that:

all security guards of National Protective Service Company Limited in the Regional Municipality of Ottawa-Carleton, save and except Director of Personnel, persons above the rank of Director of Personnel, Dispatchers, 5 Mobile Patrol Officers, 1 Site Supervisor at Statistics Canada on Holland Avenue in Tunney's Pasture, the Training Officer, office and clerical staff,

Clarity Note:

Mobile Patrol Officers generally don't provide security guard services at a specific site, but go from site to site reporting on the quality of service of the security guards and are involved in discipline of security guards.

The parties agree that employees employed in the provision of pre-board passenger screening services on behalf of the Department of National Defence at its Canadian Forces Base in Ottawa are properly excluded from the bargaining unit.

constitute a unit of employees of the responding party appropriate for collective bargaining.

28. Having further regard to the list of employees in the bargaining unit contained in the report of the Labour Relations Officer, in light of the resolution of the challenges to that list, and to the membership evidence filed by the applicant, the Board is satisfied that more than fifty-five percent of the employees of the responding party, in the bargaining unit on February 12, 1993, the certification application date, had applied to become members of the applicant on or before that date.

29. A certificate will issue to the applicant.

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**3269-92-U** United Food and Commercial Workers International Union, Local 175, Applicant v. **Pizza Pizza Limited** ("PPL"); Franchise Owners Toronto Limited ("FOTL"); 958424 Ontario Inc., carrying on business as Rapco Management Services ("Rapco"); 930571 Ontario Inc., carrying on business as Boss Technical Services ("Boss"); 3C Complete Communications Consulting Inc. ("3C"); Willow Telecommuting Systems Canada Inc. and Willow Telecommunications Corporation (collectively "Willow"), Responding Parties

**Strike - Strike Replacement Workers - Union commencing strike in October 1992 - Amendments to *Labour Relations Act*, including those prohibiting use of strike replacement workers, proclaimed in force on January 1, 1993 - Board determining that statutory provisions prohibiting use of strike replacements applying to strike which commenced prior to January 1, 1993 - Responding parties' preliminary motion to dismiss application denied**

**BEFORE:** G. T. Surdykowski, Vice-Chair, and Board Members F. B. Reaume and P. V. Grasso.

**APPEARANCES:** David A. McKee, Michael A. Church, Harry Sutton, and Ms. Carol Van Hel Voort for the applicant; Mark Crestohl and Daniel Vukovich for Pizza Pizza; Charles E. Humphrey and Maryann Crnelcovic for Franchise Owners Toronto Limited; Walter Thornton and Gary Rapkoski for Rapco Management Services and Boss Technical Services; M. E. Geiger and Mehran Manoochehri for 3C Complete Communications Consulting Inc.; Catherine Osborne for Willow Telecommunications Corporation.

**DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO;**  
April 28, 1993

1. This is an application under section 91 of the *Labour Relations Act* in which the applicant trade union alleges that the responding parties have violated section 73.1 of the Act.
2. The responding parties raised several preliminary matters. The parties agreed that the Board should first deal with the responding parties' motion to dismiss this application on the basis that section 73.1 of the Act is not applicable to the situation herein, and that the application should therefore be dismissed.
3. By majority decision dated March 8, 1993 (Board Member Reaume dissenting), the Board found that section 73.1 of the Act *does* apply and that this application should therefore proceed. The responding parties' motion to dismiss in that respect was therefore denied.
4. The majority's reasons follow.
5. For purposes of the motion, the parties' agreed to the facts material to this threshold issue as follows:
  - (a) A collective agreement between the applicant and Pizza Pizza Limited ("PPL") expired on February 28, 1992.
  - (b) Notice to bargain was given by the applicant to PPL in a timely manner on November 4, 1991.

- (c) The applicant conducted a strike vote on May 5, 1992. All those who voted indicated they were in favour of a strike.
- (d) The applicant was in a legal strike position in late May, 1992 (a "No Board Report" having been issued on April 29, 1992).
- (e) A strike began on October 5, 1992.
- (f) Together with other amendments to the *Labour Relations Act*, section 73.1 was proclaimed in force on January 1, 1993.
- (g) People were engaged to perform the struck work prior to January 1, 1993, and continued to do so after January 1, 1993.
- (h) On February 8, 1993, the applicant gave written notice that it is on strike.

In addition, we note that the legislation proposing amendments to the Act, including section 73.1, was tabled on June 4, 1992. Though not proclaimed enforce until January 1, 1993, the amending legislation was passed on November 5, 1992.

6. Section 73.1 of the Act did not exist, in any legislated form, prior to the amendments which came into force on January 1, 1993. It provides that:

73.1- (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them; ("employeur")

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

7. The question before the Board was whether this provision applies in the circumstances set out in paragraph 5, above.

8. The responding parties submitted that whether or not what are commonly called “replacement workers” can be used by an employer to perform the work of striking employees depends on whether the conditions in section 73.1 are satisfied. In other words, there are strikes to which section 73.1 applies and others to which section 73.1 does not apply. The responding parties argued that section 73.1 focuses on events, and that in this case the material events took place prior to January 1, 1993 when section 73.1 came into force. The responding parties observed that because the strike vote was taken before the amending legislation was even introduced, the persons who voted could not have been aware that a possible consequence of a vote in favour of a strike was what is asserted by the applicant herein; namely, that the responding employers have been prohibited from using replacement workers since January 1, 1993. The responding employers submitted that section 73.1 has substantially changed the relative positions of the parties by conferring a benefit on trade unions (by improving their relative collective bargaining position) to the detriment of employers (by impairing their relative collective bargaining position), relative to their respective collective bargaining positions prior to January 1, 1993, in that an employer’s ability to continue to operate its business during a lawful strike which is a strike within the meaning of section 73.1 has been severely limited. The responding employers submitted that applying section 73.1 to the circumstances herein would interfere with the collective bargaining continuum between the parties and retrospectively alter the collective bargaining balance. They argued that it would be inappropriate to change the “rules of the game” in the middle of it to the prejudice of one side; namely, the employers. The responding employers argued that section 73.1 is not retroactive, and that to apply section 73.1 as requested by the applicant would be to apply the prohibition against replacement workers retrospectively because the effect of doing so would be to attach new prejudicial consequences to past events. They submitted that there is nothing in the amending legislation or otherwise which operates to rebut the presumption against retrospectivity, in contrast to section 64.2 of the Act for example, and that that presumption therefore applies. For these reasons, the responding parties submitted that section 73.1 does not apply to the circumstances in this application.

9. The applicant agreed that section 73.1 alters the relative positions of the parties. It also agreed that it is not retroactive legislation. However, the applicant asserted that it is common for rights and relative positions of the parties to be altered by statute. Further, it submitted that a strike is a state of being, or a “status” or “characteristic”, as is being a “replacement worker”, so that this is not a question of retrospective application at all. In the alternative, the applicant argued that even if it is a matter of retrospective application of the legislation, any new consequences are not prejudicial within the meaning of the authorities because the intent is not to punish for something done in the past but to create new consequences for past events as of the date the provision came into force.

10. A basic rule of statutory interpretation is that, in the absence of a clear legislative intent to the contrary, legislation should not be construed so as to give it a retroactive or retrospective effect. In this context, there is a subtle but clear distinction between “retroactive” and “retrospective” legislation. Unfortunately, as the British Columbia Court of Appeal observed in *Martelli v. Martelli*, (1981) 130 D.L.R. 3(d) 300, the nomenclature in this area is sometimes confused. Indeed, sometimes the two labels are used interchangeably without regard to the difference between retroactive legislation and retrospective legislation (see, for example, *Venne v. Quebec (C.P.T.A.)*, [1989] 1 S.C.R. 880 (Supreme Court of Canada), *Attorney General of Quebec v. Expropriation Tribunal et al*, [1986] 1. S.C.R. 732 (Supreme Court of Canada)).

11. In its simplest form, it appears that the distinction between the two is as follows. “Retroactive” legislation looks back in time and changes the law from what it was during a period prior to its enactment. Generally, legislation is made retroactive in one of two ways: it either specifically states that it shall be deemed to have come into force as of some previous specified date, or it is expressed to be operative with respect to past events as of some previous time. “Retrospective” legislation operates only as of the day it is enacted. However, it looks to past events and attaches new consequences to events or transactions begun or even completed prior to its enactment, in terms of the continuing or subsequent effect of such events or transactions. A statute can be retroactive only, retrospective only, or both retroactive and retrospective.

12. The writings of the noted author Elmer A. Driedger in this area have often been cited with approval by the courts, including the Supreme Court of Canada. In the second edition of his book *Construction of Statutes*, Driedger offers the following summary (at pages 202 to 203):

1. A retroactive statute is one that changes the law as of a time prior to an enactment.
2.
  - (a) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
  - (b) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.
  - (c) A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.
3. The presumption [against retrospectivity] does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
4. The presumption [against retrospectivity] does not apply if the new prejudicial consequences are intended as protection for the public rather than as a punishment for a prior event.

13. As the Supreme Court of Canada recognized in *Brosseau v. The Alberta Securities Commission*, (1989) 1 SCR 301 at page 317; 57 D.L.R. 4th 458, at page 470: “While the presumption against retrospective affect is clear, there seems to be a great deal of confusion among the authorities and caselaw as to what constitutes such an effect.”

14. The presumption against the retrospective application of legislation is sometimes confused with the presumption against the interference with vested rights. These two presumptions are related, but not the same. In *Re: Royal Canadian Mounted Police Act* [1990] 2 FCR 750; 123 N.R. 120, the Federal Court of Appeal suggested that the difference between the two is that the presumption against the interference with vested rights is invoked only when a statute is reasonably capable of two meanings (that is, it is ambiguous) while the presumption against retrospectivity is a *prima facie* presumption which applies unless it is rebutted. In other words, because the alteration of existing rights is a frequently intended consequence of legislation, the presumption against the interference with vested rights is used only if the legislative intent is unclear. Or, as the Saskatchewan Court of Appeal put it in *National Trust Co. Ltd. v. Larson et al*, (1989) 61 D.L.R. 4th 270 at page 277:

“Since most statutes interfere with antecedent rights, while few operate retrospectively - one is the norm, the other is the exception - the presumption against non-interference with vested rights is weaker and more readily overcome than is the presumption against retrospectivity: See *Côté* at page 124 [of *The Interpretation of Legislation in Canada*].”

Further, as the Supreme Court of Canada observed in the course of dealing with an income tax case in *Gustavson Drilling Ltd. v. M.N.R.* (1975) 66 D.L.R. 3(d) 449 at page 462:

“No one has the vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conforms to changing social needs in government policy. The tax payer may plan his financial affairs in reliance in tax laws remaining the same; he takes the risk that the legislation may be changed.”

15. The authorities which deal with the question of how newly enacted legislation applies distinguish, for analytical purposes, between “events”, and “characteristics” or “status”. Of course, a “characteristic” or “status” does not come from nothing. Some “event(s)” must take place before a “characteristic” or “status” can come into existence. Some “events” create a “characteristic” or “status”, while others do not. Legislation operates retrospectively if it is triggered by prior events which do not create a characteristic or status. Legislation does not operate retrospectively if it is triggered by a characteristic or status, whether or not some or all of the events which created that characteristic or status occurred before the legislation was enacted. For example, in *R v. Inhabitants of St. Mary, White Chapel*, (1848) 116 E.R. 811, the statute under consideration provided that:

“No woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal, from such parish, for twelve calendar months next after his death, if she so long continue a widow.”

A woman had been widowed and a removal order had been made against her before the statute was enacted. The court held that a widow is a widow whenever she becomes one and that the application of the statute to someone who became a widow before the statute was enacted was not a retrospective application. In *R v. Levine* (1926) 46 CCC 342 (Manitoba Court of Appeal), legislation was passed making it unlawful to possess liquor in places where it had previously been lawful to do so. A person was convicted for unlawfully possessing liquor which she had lawfully purchased and possessed in the same premises before as after the legislation in question was enacted. The court held that the possession was unlawful from the day the legislation was enacted and that this did not constitute a retrospective application of the statute. In *Ward v. Manitoba Public Insurance Corp.*, [1975] 2 W.W.R. 53 (leave to appeal to the Supreme Court of Canada refused 49 D.L.R. (3d) 638n), an insurance statute provided for premium assessments based on demerit points accrued by an insured. The court held that counting demerit points accrued before the statute was enacted was not a retrospective application. In *Re Sanderson and Russell*, (1979) 24 O.R. (2d) 429 (Ontario Court of Appeal), the court held that provisions in the *Family Law Reform Act, (1978)* which expanded the definition of “spouse” for support purposes applied in circumstances in which two persons had cohabited for the requisite period prior to enactment, but who had separated and ceased cohabiting some ten months before the legislation came into force. The court held that being a “spouse” was a status, whenever achieved, and that the application of the legislation to those facts was not retrospective. (See also, *National Trust Co. v. Larsen, supra*).

16. The application of newly enacted legislation to an existing characteristic or status is not a question of retrospectivity at all. It is merely a prospective application to an existing situation. Only legislation which looks to and attaches new consequences to previous events raises a retrospectivity issue. Of the three types of legislative enactments identified by *Driedger, supra*, only one attracts the presumption against retrospectivity:

- (a) Legislation which attaches beneficial consequences to prior events  
does not attract the presumption;

- (b) Legislation which attaches prejudicial consequences to prior events *does* attract the presumption;
- (c) Legislation which imposes a penalty on a party described by reference to prior events, but which penalty is not a consequence of such events, *does not* attract the presumption.

(See *Elmer A. Driedger*, "Statutes: Retroactive Retrospective Reflections" (1978) 56 Canadian Bar Review 264 at page 271).

17. We note that in *North Shore Taxi (1966) Ltd.* (decision dated January 29, 1993, unreported), the British Columbia Labour Relations Board dealt with a provision in the British Columbia Labour Relations Code proclaimed in force on January 18, 1993 which prohibits the use of replacement workers during a strike in that Province. The British Columbia Board noted that the material events (that is, the notice to bargain, active collective bargaining, a strike, and the hiring of replacement workers) all occurred prior to proclamation, and concluded that the provision is event driven and that neither the provision nor the statute as a whole supported an application to events which occurred prior to proclamation. The B.C. Board concluded that the presumption against retrospectivity applied. In disposing of the matter, the B.C. Board focused on the act of hiring of the replacement workers and concluded that replacement workers hired prior to proclamation could continue to be used by the employer, but that the hiring of replacement workers on or after the date of proclamation was prohibited by the legislation.

18. The British Columbia statutory provision is not the same as section 73.1 of the Ontario *Labour Relations Act*. In any event, to the extent that it is applicable to the application herein, the majority was not persuaded by the reasoning of the British Columbia Board and we respectfully declined to follow it. Instead, we were persuaded by the arguments of the applicant.

19. First, we note that not *all* the material events in this case occurred prior to January 1, 1993. Employees in a bargaining unit are not considered to be on strike for the purposes of section 73.1 of the Act until the trade union which represents them has given their employer "notice in writing that the bargaining unit is on strike" (section 73.1(3)(b)). In this case that written notice was not given until February 8, 1993.

20. Second, unlike section 64.2 of the Act, section 73.1 is not retroactive legislation. Nor is the issue herein one of retrospectivity. A "strike" is a state of being. Being on "strike" describes the behaviour or status of employees who have stopped or slowed down their work in order to put pressure on their employer to accede to their collective bargaining demands. A "replacement worker" is a kind of employee; namely, one hired to replace and perform the work of a striking employee. Section 73.1 of the *Labour Relations Act* operates to make the use of replacement workers during a strike as defined by that provision unlawful. Prior to January 1, 1993, an employer could use replacement workers in any strike, including the kind of strike to which section 73.1 now applies. Now it cannot. It does not matter when a strike becomes a "strike" within the meaning of section 73.1, or when the requisite events in that respect occurred. Nor does it matter when "replacement" workers are hired. After January 1, 1993, whenever there is a strike within the meaning of section 73.1, an employer cannot use replacement workers (except as specifically permitted - see section 73.2 of the Act).

21. In the alternative, even if applying section 73.1 to the facts herein did constitute a retrospective application of that provision, section 73.1 does not attach "prejudicial consequences", in the sense of the Driedger analysis, to events which occurred prior to January 1, 1993. As Driedger points out, legislation which imposes a penalty on a party *described* by past events, as opposed to

imposing a new or additional penalty as a *consequence* of past events, does not attract the presumption against retrospectivity. The distinction is a rather subtle one but comes down to this: legislation which imposes a prejudicial consequence (one kind of which is a penalty) for past conduct or events attracts the presumption; legislation which imposes a prejudicial consequence for present conduct with roots in past events does not attract the presumption.

22. We are unable to see how applying section 73.1 in this case would constitute a penalty. The *Labour Relations Act* is not a penal statute and section 73.1 is not a penalty provision. Nor does section 73.1 attach any other kind of prejudicial consequences to events or behaviour which occurred prior to January 1, 1993. The “prejudicial consequences” of section 73.1, insofar as there are any, relate to current events or conduct which are (in this case) partly rooted in past events. This does not attract the presumption against retrospectivity.

23. Section 73.1 imposes no penalty and attaches no other prejudicial consequences to events or behaviour of an employer prior to January 1, 1993. Whether or not an employer employed replacement workers prior to January 1, 1993, or indeed since then but prior to a strike becoming a “strike” within the meaning of section 73.1, is irrelevant. Section 73.1 merely prohibits the use, or continued use, of replacement workers after the date when the preconditions of section 73.1 are satisfied. To the extent that section 73.1 may be triggered by events or conduct which occurred prior to January 1, 1993, these are entirely within the control of the trade union and the employer’s conduct until that time is irrelevant. In other words, if a trade union conducts an appropriate strike vote which is supported by the requisite number of voting employees, and the trade union gives the appropriate notice that the bargaining unit is on strike, section 73.1 operates to restrict employer conduct or behaviour by prohibiting the use or continued of replacement workers. In the result, the presumption against retrospectivity does not apply.

24. Even if this is a question of retrospectivity and has the prejudicial effect asserted by the responding employers such that the presumption against retrospectivity does apply, the clear purpose and intent of section 73.1 is precisely what the responding employers complain about; that is, to alter the collective bargaining balance by making it unlawful for employers to use replacement workers during strikes within the meaning of section 73.1 except as permitted by section 73.2, effective January 1, 1993. This clear legislative intent operates to rebut the presumption against retrospectivity. Applied to this case, this means that the employer(s) of the bargaining unit employees on strike herein would not be entitled to hire or continue to use replacement workers after February 8, 1993 - if the other preconditions of section 73.1 have been satisfied, something which remains to be determined.

25. Finally, we find ourselves constrained to ask ourselves this question: If section 73.1 is repealed in the future, will an employer (either one of the responding parties herein or otherwise) accede to a trade union’s argument that the prohibition against replacement workers in section 73.1 continue to apply to an existing “strike” within the meaning of that provision? We seriously doubt it.

26. In the result, the majority of the Board was satisfied that section 73.1 of the *Labour Relations Act* can apply to the circumstances herein and ruled that this application should proceed as aforesaid.

27. We wish to make it clear that all that the Board has decided in this case on March 8, 1993 was that section 73.1 of the Act does apply. The Board decided nothing with respect to any other issues, preliminary or otherwise, raised in this application, including whether the strike herein is a “strike” within the meaning of section 73.1.

**DECISION OF BOARD MEMBER F. B. REAUME; April 28, 1993**

1. With respect to my colleagues, I must dissent from their decision.
  2. The compelling argument in this case is the impact on the bargaining process which was virtually completed early in 1992, several months before the new legislation was enacted. Indeed all facts of the bargaining process - negotiations, conciliation and even strike action - were completed in advance of the new legislation.
  3. It is patently unreasonable and prejudicial to retrospectively alter the bargaining positions after they have been effectively put in place. I am in total agreement with the British Columbia North Shore Taxi decision (see paragraph 16 of the decision) in this matter.
  4. I cannot accept that the Legislature intended to alter the collective bargaining balance in those instances where strike actions took place before the enactment of the legislation. I submit that this Legislature did not intend this result or they would have clearly made it retroactive as they did in other sections of the new legislation. It is not the function of this Board to second guess the Legislature on these matters.
  5. For the above reasons, I would have dismissed the application.
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**2858-92-R International Brotherhood of Electrical Workers, Local 120, Applicant v. Precision Alarms and Signal Systems Limited, Responding Party**

**Bargaining Unit - Certification - Construction Industry - Employer replying to union's construction industry certification application by taking position that it was not a business in the construction industry - Union subsequently amending bargaining unit description - Board extending terminal date and re-posting - Board rejecting employer's argument that "application date" should not be when application filed, but rather date on which union acknowledged that it did not pertain to the construction industry and requested change in the bargaining unit description - Certificate issuing**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

**APPEARANCES:** *Bernard Fishbein* and *Don Thompson* for the applicant; *Kenneth Duggan* and *Brian P. Smith* for the responding party.

**DECISION OF THE BOARD; April 28, 1993**

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. Having heard and considered the parties' representations, the Board finds the following to be a unit of employees appropriate for collective bargaining:

all employees of Precision Alarms and Signal Systems Limited employed as service technicians at and out of the City of London, save and except service/operation manager and persons above the rank of service/operation manager, office and clerical, persons employed in the central receiving station and persons regularly employed for not more than twenty-four hours per week.

4. This application was filed on December 21, 1992. It was originally described as an application pertaining to the construction industry because (it was said) the employer's business involved the installation and maintenance of alarm systems. Subsequently, the union sought to amend the bargaining unit description when the employer took the position (and it became apparent) that it was not a business in the construction industry. As a result of this request, the Board extended the terminal date and directed a re-posting to ensure that any employees potentially affected by this application would have notice. It should be noted, however, that regardless of this dispute about the description of the bargaining unit, it has been clear from the outset that the application relates to employees servicing alarm systems in the London area.

5. The employer contends that the "application date" should not be December 21 when the application was filed, but rather the date on which the union acknowledged that it did not pertain to the construction industry and requested the change in the bargaining unit description so that it conforms to the actual nature of the employer's business. In effect, the employer urges the Board to treat the situation as if a new application had been made at that time - with the result that the number of employees actively at work on the application date is smaller and the identity of those employees is different than on December 21, 1992 when the application was filed with the Board.

6. In *Gallant Painting*, [1987] OLRB Rep. Mar. 372, the Board held, in part:

2. ... in circumstances where an application for certification has been brought under the construction industry provisions and those provisions have subsequently been found not to be applicable, it has been the Board's practice to treat the application as though it had been made under the general provisions (see, for example, *J.A. Wilson Display Ltd.*, [1983] OLRB Rep. July 1080; *Township of Loughborough*, [1975] OLRB Rep. Feb. 122). ...

That is what has happened here. There has been no "new" application for certification after December 21, 1992, but rather a refinement of the parties' positions in an existing application; moreover, the union's characterization of this proceeding as one to which the construction industry provisions of the Act relate is, at most, a technical error or irregularity. The fact that there was a change in the bargaining unit description to more precisely reflect the nature of the employer's operations and a consequent new notice to employees and extension of the terminal date, does not alter the fact that the application date was and remains December 21, 1992. Whether or not the Board has jurisdiction to declare the application date to be something else, the Board sees no reason why it should do so here, or depart from the approach enunciated in the cases mentioned above.

7. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on December 21, 1992, the certification application date, had applied to become members of the applicant on or before that date.

8. A certificate will issue to the applicant.

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**3402-92-R United Steelworkers of America, Applicant v. Tate Andale Canada Inc., Responding Party v. Group of Employees, Objectors**

**Certification - Charges - Evidence - Intimidation and Coercion - Petition - Practice and Procedure - Witness - Board reviewing principles governing restricted scope of reply evidence and declining to permit employer to split its case by calling one witness to events in dispute during its case in chief, and the other witness during reply - Board concluding that timely petition not a voluntary expression of employee wishes - Board finding no intimidation or other improper conduct by union casting doubt on union's membership evidence - Certificate issuing**

**BEFORE:** *S. Liang, Vice-Chair.*

**APPEARANCES:** *Robert Healey and Brando Paris for the applicant; Eric M. Roher and Brian McBain for the responding party; Eric Power and Jim Cacouryotis for the objectors.*

**DECISION OF THE BOARD; April 22, 1993**

1. This is an application for certification in which the United Steelworkers of America ("the Steelworkers" or "the union") seeks to be certified to represent the employees of Tate Andale Canada Inc. ("Tate" or "the company"). The parties have agreed to the following bargaining unit, which the Board finds appropriate for collective bargaining:

all employees of Tate Andale Canada Inc. in the City of Vaughan, save and except Supervisor, persons above the rank of Supervisor, office, clerical and sales staff.

2. As disclosed to the parties prior to the hearing, the union filed in support of this application documentary evidence of membership on behalf of 13 persons. A statement of desire (or "petition") was also filed with the Board, on the application date, February 19, 1993. This petition contains 13 signatures, all of which correspond to the list of persons employed in the bargaining unit on the application date. Of these 13 signatures, 8 coincide with the names of persons on whose behalf the union has submitted membership evidence. The union takes the position that this petition does not constitute a voluntary expression of the wishes of the employees signing it.

3. On the first day of hearing, Eric Power appeared on behalf of the employee objectors. Jim Cacouryotis is also a representative of the employee objectors. Mr. Cacouryotis wrote to the Board prior to the hearing asking that the matter be adjourned for the first day, since he would be unable to attend because he was attending to the real estate deal on a new home. The applicant did not consent to the adjournment request. At the hearing, Mr. Power indicated that he and Mr. Cacouryotis intended to give evidence in support of the petition, that Mr. Cacouryotis was unable to attend on the first day, but that he was prepared to commence the hearing without Mr. Cacouryotis.

4. In addition to the voluntariness of the petition, the list and composition of the bargaining unit on the date of the application is also in dispute. The parties disagree as to the status of Richard Grainger. The union asserts that Grainger is not an employee in the bargaining unit insofar as he is a member of the sales staff. Although prior to the hearing, there was an issue as to whether Heath Sweetman and Rodney Cake properly belong on the list of employees, by the time of the hearing, this was no longer an issue. The terminations of Sweetman and Cake prior to the date of application were the subject of separate proceedings before the Board, which resulted in an interim order dated March 2, 1993, reinstating them pending the disposition of further hearings, and a final order dated March 26, 1993. In this final order, the Board found Tate in contravention

of the *Labour Relations Act* in, among other things, the discharge of Sweetman and Cake and ordered their reinstatement.

5. I was therefore satisfied that Sweetman and Cake belong on the list of employees employed for the purposes of this application, and so informed the parties at the hearing.

6. Another issue before me was raised by the company's response of March 1, in which it alleges that "inside organizers of the applicant, which we have been told were Heath Sweetman, Ken Relf, and Rod Cake, threatened at least one bargaining unit employee with harm if they did not sign a card for the applicant." The company states that a "bargaining unit employee, Cecil Persaud, recently complained to his immediate supervisor Brian Boucher about such threats."

7. By letter dated March 17, 1993, the company also requested the Board to investigate what it terms irregularities with respect to certain membership evidence. The union filed in this application a Declaration Verifying Membership Evidence. This Declaration discloses certain facts about some of the documents filed. For instance, the Declaration notes that some of the membership documents were signed by the employee on one date and subsequently given directly to the receiver on the next date, who then signed the document and attested to having received the card directly from the employee. The union filed a Supplementary Declaration on February 22 in which it disclosed, in addition to the facts contained in the original Declaration, that one application for membership was signed and dated February 5 and was signed by the receiver as having been received as well on February 5. In fact, the Supplementary Declaration states, the receiver incorrectly dated his signature and the application for membership was actually received on February 16. The company requested that the Board inquire into this membership evidence on the basis that there is no explanation for the eleven day hiatus between the signing of the card and the receipt of the card by the receiver.

8. At the hearing of this matter, the Board informed the parties that it saw no reason to inquire into the membership card. Unlike circumstances where the material before the Board casts doubt on whether a particular employee in fact signed a membership card, there was nothing in the material before me, including the statements made in the Declaration and Supplementary Declaration, which would cause the Board to conduct an inquiry into the validity of this evidence.

9. At the commencement of the hearing, since the objecting employees participating in this hearing were appearing without counsel, the Board outlined for Mr. Power's benefit the role of the Board, the nature of the proceedings and the nature of the issues to be determined. I explained that the Board's role is to decide the issues before it. The Board does not advise parties as to how to present their case, but relies on them to call evidence and present argument in support of their positions. Parties have the right to appear with or without counsel, but if they choose to appear without legal representation, they bear the risks associated with this choice, having regard to the fact that this is a legal proceeding conducted according to certain legal rules. I explained that the parties will have the right to call witnesses to give evidence based on their first-hand knowledge of the matters in issue, and that each side will have the right to cross-examine witnesses called by the other side.

10. I also outlined briefly the nature of the issues before the Board with respect to the petition. The Board looks to whether the petition represents the voluntary wishes of the employees who signed it. The Board is interested in hearing first hand evidence on this issue, such as evidence as to how the petition got started and prepared, how it got circulated, who had the petition at all times, and how each signature on the petition was obtained. I also explained how the Board in this inquiry maintains the confidentiality of signatories to the petition, by using "P" numbers to identify them.

11. As a final preliminary matter, the Board informed the parties prior to the commencement of the evidence that on close inspection, the petition appears to contain a sentence stating "P.S. this petition will be posted on the bulletin board in the shop." This line has been obscured with liquid paper, but is still visible held up to light. During the course of the hearing, the parties were given the opportunity to inspect the petition, after the Board made arrangements to cover the signatures, and verified the wording of the sentence for themselves.

### **Voluntariness of the Petition**

12. Eric Power and Jim Cacouryotis testified on behalf of the petitioners with respect to the origination, preparation and circulation of the petition. Russell Brown, Rodney Cake and Heath Sweetman were called by the union. In reconciling conflicts in their evidence, I have taken into account such factors as the consistency of their testimony and their demeanour and apparent ability to resist the influence of self-interest. In the final result, I also draw inferences from the evidence in order to assess what is most probable in the circumstances of this case.

13. The idea of a union had been discussed amongst some of the employees since about November of 1992. However, it was only after the first part of January that the idea received more serious consideration. On Monday, February 1, Heath Sweetman and Ken Relf met with Brando Paris, an organizer for the applicant. The impetus for this meeting came from Sweetman. Relf was in attendance because he drives Sweetman to work. On this date, Sweetman was given union membership cards and was instructed on how to begin organizing the employees and distributing cards. From this date forward, both Sweetman and Cake began their efforts to convince employees to sign cards. On February 15, Sweetman was fired and on February 16, Cake was fired. Both were reinstated on an interim basis by order of the Board dated March 2. This application and the petition were filed on February 19.

14. On the evening of February 16, while Cacouryotis was on night shift, he went into the office of one of the supervisors and typed the heading of the petition. He then showed the petition to two other employees on this shift, P11 and P12. At first, Cacouryotis stated that he typed the whole heading and showed the petition to P11 and P12. When confronted with the suggestion that P11 and P12 therefore read the "P.S." line on the petition, he then stated that he typed the heading first, showed the document to P11 and P12, then typed the "P.S." line, then decided to white-out the "P.S." the next morning.

15. In any case Cacouryotis did not begin to circulate the petition for signatures on the night of February 16. Instead, two days later, on February 18, he came into work about 11:30 a.m., just before the lunch break. Since Cacouryotis was working night shift at this time, he was not on his work time during this visit. He approached Eric Power as well as one other employee on the shop floor. Cacouryotis, Power and this other employee signed the petition at this time.

16. At about 11:40 a.m., employees started their lunch break. About a dozen employees went into the lunchroom, which is located up a set of stairs from the shop floor, and has an open wall overlooking the shop. Cacouryotis addressed the employees and placed the petition on a table. Among other things, he stated that he intended to leave the petition on the table when he left so that everyone would have the chance to look at it.

17. It was the evidence of Russell Brown that the line "P.S. This petition will be posted on the bulletin board in the shop" was apparent on the petition during this meeting. He told Cacouryotis that it would be unfair to post the petition with signatures on it in the shop. Cacouryotis replied that he would copy the document and post only the typewritten portion. Brown also testified that during his remarks to the employees, Cacouryotis told them that one of the disadvantages

of unionization would be that since the company was based in the United States, management might decide to move the shop to the U.S. as a result of the union.

18. Brown also testified that during this meeting, he stated that the only circumstance under which he might sign a petition were if Cake and Sweetman were reinstated. It was well known throughout the shop that they had been fired earlier in the week. As a result of this statement by Brown, Cacouryotis said that he would speak to Brian McBain, the General Manager, about Sweetman and Cake. He left the meeting. When he returned a few minutes later, he told the employees that MacBain had said he could not discuss the matter with Cacouryotis since the issue was before the Labour Board and his lawyers had advised him there was to be no discussion. Brown took this to mean that reinstatement was not negotiable. Brown left the meeting shortly afterwards, although some employees remained behind to sign the petition. P4, P5, P6 and P7 signed the petition in the lunchroom at this time.

19. The lunch break usually ends about 12:05 to 12:15 since it is supposed to be a half-hour in duration. This meeting lasted until about 12:30. At one point during this meeting, Brian Boucher, the shop foreman came partway up the stairs. Cacouryotis told him that the employees were having a meeting, and Boucher left.

20. Some of Brown's evidence regarding the events of this meeting was challenged by Power and Cacouryotis in their cross-examination of him. However, they called no evidence in reply. In any case, I choose to prefer Brown's evidence where it cannot be reconciled with that of the petitioners. The evidence of Cacouryotis, in particular, with respect to the typing of the petition and the whiting-out of the "P.S." line was somewhat incredible and casts some doubt in my mind on the reliability of the rest of his evidence, particularly where it is in conflict with that of Brown.

21. After the meeting ended, Cacouryotis took the petition back to the shop floor with him. He approached P8, who was working on a screen machine. He then approached P9 and P10 on the shop floor. All three employees (who, incidentally, had attended the lunchroom meeting) signed at this time. Cacouryotis then left work, and returned later in the day for his shift, at which time P11 and P12 signed the petition. The next morning, about 7 a.m., Cacouryotis returned to the workplace. He went directly to the sewing room, where P13 was working, who signed the petition. Cacouryotis then took the petition to the Board personally.

22. During the course of the hearing, the objecting employees requested permission to file a number of statements signed by employees who were not present at the hearing. Some of the statements, the Board was informed, were similar to the petition which was filed on the date of application, signed by employees who were absent from work when the petition was circulated. The other statements were signed over the course of a few days after the application date by employees who had signed the petition, and indicated that their signing of the petition was voluntary.

23. I declined to receive the statements. In addition to constituting hearsay evidence, this type of evidence is of very limited assistance to the Board in determining the issue of the voluntariness of the petition. At the very least, it would involve the Board in a further level of inquiry, to determine whether the second set of statements are voluntary. In this case in particular, where the statements are made almost simultaneously with the petitions, I am reluctant to treat them as proof of employee wishes separate and apart from the petition itself. Finally, some of the statements are clearly inadmissible by virtue of section 8(4)2 of the Act, having been presented well after the certification application date.

24. On the issue of the voluntariness of the petition, counsel referred us to the following cases: *Drillex International of Canada Inc.*, [1991] OLRB Rep. Feb. 169; *Willow Manufacturing Company Limited*, [1980] OLRB Rep. July 1131; *Aluminum Reduction Company*, [1985] OLRB Rep. Jan. 8; *Blue Bell Canada Incorporated*, [1990] OLRB Rep. Feb. 121.

25. In *Drillex International of Canada Inc.*, the Board referred to the following quote from *Chatham Concrete Forming* as setting out the Board's approach in petition cases:

13. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinion about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, ... Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

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16. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they are doing so voluntarily, and are not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. And lest it be thought that the identification of union supporters and opponents is neutral information, one must remember that the Legislature does not regard it that way. Section 111 of the Act is designed to preserve the secrecy of the employees' choice. The Legislature has recognized the employees' concerns and sensitivities. ...

7. Frequently, as in the present case, anti-union petitions are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign a petition because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. On the other hand, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable. Again, that is why the Act preserves the secrecy of union membership.

8. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the

Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. ...

26. I am not satisfied on the facts of this case that the petition, on the balance of probabilities, represents the voluntary expression of the wishes of those who signed it. The petition originated almost contemporaneously with the firings of two key union supporters. It was circulated without much attempt at secrecy on the shop floor, during working hours. It was also discussed and put before employees during a lunch break. In the midst of this discussion, Cacouryotis left for a few moments to speak to the General Manager with respect to an issue raised during the meeting. The shop foreman was aware that a meeting of employees was taking place. Although the meeting (which was called at the instance of an employee who was visiting the shop outside of his normal working hours) extended beyond the normal lunch break, the foreman made no attempt to have employees return to work.

27. I find that the petition which was circulated for signature bore the statement that it would be posted in the shop. Although Cacouryotis told the employees in the lunchroom that he intended to post only the typewritten portion, I am not satisfied that this would have been sufficient to dispel the impression that this statement would leave. The statement only reinforces the relatively casual manner in which the petitioners treated the confidentiality of the petition. Adding to this impression is the fact that employees signing in the lunchroom understood that the petition would be left on the table. Although Cacouryotis stated that he changed his mind about this and took it with him at the end of the lunch break, he did not tell the employees this, and they again would have reason to doubt the security of the identity of those who had or had not signed the petition.

28. As stated by the Board in *Chatham Concrete Forming*, it is natural to wonder what prompts a change of heart by employees who had recently signed union membership cards. The change of heart may well be genuine, but there is an onus on the party seeking to rely on petition to show that it is a voluntary change of heart: see also, *Radio Shack* [1978] OLRB Rep. Nov. 1043. The petitioners fall short of that onus in this case. I am unable to accept that the decision to sign this petition could have been unaffected by the combined effect of the well-known dismissal of the two key union organizers and the appearance of tacit management approval of the petition, resulting from the departure of Cacouryotis to speak to MacBain during the meeting in an effort to “negotiate” the reinstatement of Sweetman and Cake, and from the uninterrupted time, extending beyond the usual lunch break, given to the employees to have this meeting. In addition is the perception of management approval that would be left by Cacouryotis’ unhindered access to employees at work, while he was not on shift, for the purpose of obtaining signatures on the petition. In the circumstances, there is considerable doubt as to whether the reasonable employee could have been assured that his or her failure to sign the petition would not become known to management or result in reprisals.

29. My conclusion that these various factors played a part in the “success” of the petition is reinforced by the apparent lack of much discussion amongst the employees about the issue. From the evidence, it appears that with almost no effort, the petitioners succeeded in convincing the majority of employees, the majority of which had been to this time supporters of the union, to sign the petition. In the result, I conclude that this petition is not a voluntary expression of employee wishes.

### Intimidation Allegation

30. Section 71 of the Act states:

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

31. Cecil Persaud, a shop employee, testified that on a Friday afternoon, in the first week of February, just as employees were getting ready to leave work, he was given a card by Heath Sweetman in the lunchroom (which also serves as a locker room). Persaud testified that right after Sweetman gave him the card, as he left the lunchroom and came downstairs onto the shop floor, Cake and Ken Relf were having a conversation at the bottom of the stairs. As he reached the floor, Cake looked at Persaud and stated "anyone who says anything about the union will have their legs broken". Nothing more was said, Persaud proceeded to punch out, and then left for home. After the weekend, Persaud was approached again by Sweetman who asked if he had signed the card yet. After the second approach, Persaud returned the signed card to Sweetman.

32. Persaud stated that a few weeks later, he reported to management that he had been threatened by Cake, in the presence of Relf. Persaud also testified that he had a conversation with Cake after Cake was reinstated to the workplace. At this point, Persaud was receiving workers' compensation benefits and was returning to work to pick up his tools. While he was in the shop, Cake approached him. According to Persaud, Cake had heard of the allegations being made against him. Cake admitted to Persaud that he had threatened him and told him not to take it so seriously.

33. The evidence of Rod Cake is in vivid contrast to that of Persaud. Cake has no recollection of any conversation with Persaud like the one described by Persaud. However, he vigorously denies ever making such a threat. The only conversation he recalls having with Persaud with respect to the union occurred in January, before Sweetman received the cards from Brando Paris. In this conversation, Persaud responded positively to the idea of a union and indicated that when they got the membership cards, he would sign one. Cake does recall having a conversation with Persaud after Cake's reinstatement. In his evidence, he approached Persaud because he was disturbed to hear about the allegations made against him. Persaud told him that he was afraid for his job if the union came in and there were layoffs, since he was near the bottom of the seniority list. Persaud stated that Cake had made a comment to him to the effect that if anyone told management about the organizing drive, that person would get a stiff kick in the rear. In Cake's evidence, Persaud stated he told management that he was afraid and did not want to get hurt or have his legs broken. Persaud told Cake during this conversation that he had not made an allegation that Cake had threatened to have Persaud's legs broken.

34. According to Cake and Sweetman, Persaud had responded only positively to discussions about the union. Cake and Sweetman were both clear in their testimony that they gave membership cards out to employees only once that employee had indicated his or her support for the union. According to Sweetman, he gave a blank card to Persaud on Thursday, February 4, Persaud signed the card on the same date and returned it to Sweetman later on the same date. Persaud was one of the first employees to join. This is consistent with the evidence that Sweetman received the membership cards from the union on Monday, February 1 and with the fact that Persaud's card bears the date of February 4.

35. On balance, compelled to choose between the evidence of Persaud and the evidence of Cake on the incidents in question, I choose the evidence of Cake. On the whole, I find it more plausible, internally consistent, and consistent with the evidence as a whole surrounding this organizing drive. Five separate witnesses, some of whom clearly opposed the organizing drive, testified as to events during and around the organizing drive. In all of this evidence, other than the state-

ment that Persaud claims was made by Cake, there was no hint of any intimidation, threats, coercion or improper activity by the union's inside organizers. The only other suggestion of a complaint related to the organizers' undue persistence. Even on Persaud's own evidence, the only other conversation he had with Cake about the union was when Cake asked him if Sweetman had spoken to him about the union. In the context of this organizing drive as described by these witnesses, the allegation that Cake threatened Persaud with broken legs if he said anything about the union is quite simply incredible.

36. On the evidence, I find it more plausible that Cake made a statement that anyone who told management about the organizing drive would get a stiff kick in the rear and that this statement was not directed particularly at Persaud. In its context, such a statement does not in itself offend section 71 of the Act. I also find it more plausible that Persaud initially agreed to support the union, for reasons unconnected to the "threat" he felt had been made against him, and later changed his mind. I find that at the time Persaud was given and signed the membership card, he had decided to support the organizing drive. If he was indeed disturbed by Cake's comment that anyone telling management about the union would get a kick in the rear, he did not find it sufficiently disturbing to report it to management until several weeks later. Incidentally, I also note that by the time he decided to report the incident, both Cake and Sweetman had been unlawfully fired.

37. In assessing the evidence, I also have regard to the fact that Persaud, in his own evidence, appears to be as perturbed by what he characterizes as "lies" by the union, as by any alleged threat. More than a few times in his evidence he expressed his anger that the union had lied to him. According to Persaud, he had been told that most employees in the shop had signed membership cards, in an effort to convince him to sign. Whether or not this was technically true at the time that Persaud signed his card, I do not find such a comment to be misrepresentation that would cast doubt on the membership evidence.

38. I thus find that there has been no intimidation, coercion or other improper conduct by the union which casts doubt on or gives me any reason to reject the membership evidence relating either to Mr. Persaud or to any other employee.

39. Before continuing, I find it appropriate at this point to set out an evidentiary ruling made in the course of this hearing, in response to the stated intention by counsel for the company to call reply evidence. At the outset of the hearing, the Board ruled that it would hear all of the parties' evidence and submissions on all of the issues in dispute. The issues remaining to be determined were understood by the Board and by all the parties to be: the voluntariness of the petition, the allegation of intimidation against the union and the status of Richard Grainger. The petitioners proceeded first. The company then called Persaud and Grainger to give evidence. The union called Brown, Sweetman and Cake. The petitioners indicated that they had no evidence to call in reply. Counsel for the company indicated that the company wished to call Ken Relf as a reply witness. This was objected to by the union.

40. Counsel for the company indicated that the evidence of Relf related directly to the issue of whether Cake made the statements as alleged by the company. His evidence, it was submitted, would be that Cake had indeed made the statements alleged. Counsel stated that until Cake testified, the company was unaware of what the precise details of Cake's evidence would be, and was unaware that the union would deny that Cake had made the statements. Counsel accepted that Relf's testimony could not go beyond the statement itself, but on the issue of whether Cake made a threat to Persaud and what the threat was, the company had the right to call reply evidence.

41. I ruled that the evidence of Relf was not proper reply evidence and declined to hear it.

From the beginning of these proceedings, one of the very issues in dispute between the parties, raised by the company, has been the alleged threat from Rod Cake to Cecil Persaud. It is the responsibility of a party putting in its case, to put in *all* of the evidence that it can adduce through reasonable diligence, in support of its case. The evidence of Mr. Relf is not in response to anything new in the union's case, but goes to the heart of the issues which have been in dispute from the beginning. I note that if it was not so apparent earlier, it also became abundantly apparent during the union's detailed cross-examination of Mr. Persaud what the nature of Mr. Cake's testimony would be.

42. Counsel should be well aware of the restricted scope of reply evidence and the dominant policy reason for it: quite simply, a party responding to a case is entitled to know the entire case that it must meet, because it will have no further opportunity to call evidence. The Board's decision in *Luciano D'Alessandro and Donato Marinaro*, [1985] OLRB Rep. Feb. 241, to which I was referred, provides a useful summary of the principles of reply evidence:

2. ...

Since the majority of the Board's hearing time yesterday was taken up by submissions of counsel concerning whether or not certain evidence could properly be adduced as reply evidence, it may be useful for the Board to rule not only on the specific point which has been argued (most recently), but also to provide a more general indication of what we perceive to be the proper scope of reply evidence. During his submissions in support of his contention that evidence concerning the Union meeting of May 12, 1983 may properly be called in reply, counsel for the complainants contended that he could call certain witnesses to testify about that meeting as part of his case in chief and hold another witness in reserve to be called in reply in the event that the respondents called witnesses to contradict evidence on that point given by the complainants' witnesses in chief. Apart from a general reference to *Phipson on Evidence*, without referring the Board to any particular page or passage in that text, counsel cited no authority for that proposition.

It is well established in the law of evidence and in the Board's jurisprudence that a plaintiff or complainant cannot split his case in the manner suggested by counsel for the complainants. As noted in *Phipson on Evidence* (12th Ed. 1976) at paragraph 616, "[e]vidence in reply ... must, as a general rule, be strictly confined to rebutting the defendant's case, and must not merely confirm that of the plaintiff. See also *Wilco-Canada Inc.*, [1983] OLRB Rep. Jan. 165, in which the Board wrote as follows at paragraph 13:

The normal scope of reply evidence is aptly described in the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974) at page 517:

"At the close of the defendant's case, the plaintiff has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. As a general rule, however, matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded. A plaintiff is therefore precluded from dividing his evidence between his case in chief and reply, for two very practical reasons:

'... first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case [he] had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning' [6 Wigmore on Evidence, s. 1873, p. 511].

(See also *Allcock Alight & Westwood Limited v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 O.R. 18 (C.A.).

.....

Having considered the submissions of the parties, we are not satisfied that the evidence concerning the meeting of September 8, 1983 which complainant's counsel seeks to adduce as reply evidence through Gerry Varrichio could not, through the exercise of due diligence, have been adduced as part of their case in chief, as was done through the testimony of Frank Garrett on October 18, 1984, particularly in view of the fact that Mr. Minsky notified Mr. Garrett during cross-examination that he intended to call Dan D'Andrea to contradict Mr. Garrett's evidence in respect of that matter. Failing that, we are not satisfied that through the exercise of due diligence, in preparing for his cross-examination of Dan D'Andrea, complainant's counsel could not have placed himself in a position to satisfy the requirements of the rule of *Browne v. Dunn* in respect of that evidence. In this regard, we note that at the request of complainant's counsel, the hearing was recessed on December 12, 1984 one and one half hours in advance of the time to which the Board had earlier indicated it was prepared to sit, in order to afford complainant's counsel time to prepare for his cross-examination of Dan D'Andrea. When the hearing resumed on the following morning, complainants' counsel made no suggestion that he had not had sufficient time to prepare for the cross-examination or to explore any appropriate avenues of investigation with respect to it. Accordingly, we are of the view that this evidence cannot properly be called in reply, either on the basis of the rule which precludes a complainant from splitting his case, or on the basis of the rule in *Browne v. Dunn*, as explained in our earlier ruling today. Accordingly, Mr. Minsky's objection is upheld.

43. The facts of this case and my ruling are very similar to those in the case above, and the governing principles the same. I saw no reason in the circumstances of this case to permit the company to split its case by calling one witness to the events in dispute during its case in chief, and the other witness during reply.

#### **Status of Richard Grainger**

44. From the evidence adduced, I have little difficulty in finding that Richard Grainger is an employee within the bargaining unit. Although he has considerable experience in the industry prior to joining Tate, and thus brings to his job at Tate the benefit of his experience, knowledge and contacts, in essence Grainger is a screen machine operator. He spends the vast majority of his working day at his screen machine, manufacturing screen. On occasion, he may speak to customers of Tate who telephone for him. These customers may inquire about the possibility of having certain work done, in which case Grainger directs them to Brian MacBain. Other times, customers call to find out how work is progressing on their orders, and Grainger will give them an update.

45. As stated above, Grainger has considerable experience in this field of work. Prior to joining Tate, he worked for 25 years for a competitor of Tate which closed its shop in Canada and moved to the United States. Because of his expertise, knowledge and contacts, Grainger requested and was given certain terms of employment when he joined Tate which are different from those of other employees. For instance, he is paid on a salary instead of per hour. He also does not punch a time clock, although he appears to work the same hours as other employees.

46. Outside of receiving telephone calls from customers, some of whom are former customers of Grainger's former employer, he does not have responsibilities which bring him into regular contact with customers. The extent of his contact with these former customers is the telephone calls which he receives from time to time. He is not involved in sales, outside promotion or business development. He does not receive a commission. Grainger stated that he has signed a non-solicitation agreement with his former employer so that he is not permitted to solicit work from their former customers.

47. There is no doubt that Grainger was hired by Tate because of his prior experience, and there is probably no doubt that Tate hoped that it could benefit from his contacts and acquire some

of the business of his former employer. However, this was not achieved by giving Grainger any special duties or status beyond those described above. I do not consider the differences between his duties and those of other machine operators to be so significant as to take him out of the bargaining unit.

48. Having regard to the determinations above, the material before me and the agreements of the parties, the Board makes the following findings.

49. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

50. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list. The Board is satisfied that there were 22 employees in the unit at the time the application was made.

51. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of 13 cards, all of which coincide with the names of the employees in the bargaining unit. The cards are signed by each employee concerned and indicate a date within the six-month period immediately preceding the application date. The membership evidence is supported by a duly completed Declaration Verifying Membership Evidence.

52. The Board is satisfied on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 19, 1993, the certification application date, had applied to become members of the applicant on or before that date.

53. A certificate will issue to the applicant.

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### **3410-92-R United Steelworkers of America, Applicant v. Wackenhut of Canada Limited, Responding Party**

**Bargaining Unit - Certification - Security Guards - Union's proposed bargaining unit described in terms of regional municipalities or counties - Employer's proposed bargaining unit covering all employees sought by union but described in terms of individual municipalities - Board finding no reason in this case to depart from its usual practice of describing bargaining unit in terms of the municipality in which the workplace(s) is (are) located - Board appointing officer to inquire into parties dispute regarding "employee" status of certain individuals - Union certified on interim basis pending final resolution of matters in dispute between parties**

**BEFORE:** G. T. Surdykowski, Vice-Chair, and Board Members W. N. Fraser and H. Peacock.

**APPEARANCES:** Robert Healey and Douglas Foley for the applicant; Brian P. Smeenk, Debra Coles, and Gerry Brennan for the responding party.

**DECISION OF THE BOARD;** April 27, 1993

1. This is an application for certification which came on for hearing before the Board on April 19, 1993. The application does not relate to the construction industry.

2. The applicant sought to be certified for a bargaining unit of employees of the responding party which it describes as follows:

“all security guards of Wackenhut of Canada Limited in the Regional Municipality of Waterloo, the County of Perth and the County of Wellington, save and except patrol supervisors and persons above the rank of patrol supervisor, dispatchers, office, clerical and sales staff and, pending resolution by the Board, excluding as well site supervisors and Robert Hertzberger and Lyle Ruby, classified as patrol supervisors”.

3. The responding employer’s position was that the bargaining unit herein should be described as follows:

“all security guards of Wackenhut of Canada Limited in the City of Kitchener, the City of Waterloo, the City of Cambridge, the Town of Listowel and the City of Guelph, save and except patrol supervisors, persons above the rank of patrol supervisor, dispatchers, office, clerical and sales staff, and, pending resolution by the Board, excluding as well site supervisors and Robert Hertzberger and Lyle Ruby, classified as patrol supervisors”.

4. There was no dispute about the facts material to this issue. The employees affected by this application all work in one of the five municipal centres specified in the responding employer’s proposed bargaining unit; namely, Kitchener, Waterloo, Cambridge, Listowel or Guelph. There are a total of twelve work sites, ten in the Regional Municipality of Waterloo (that is, in either Kitchener, Waterloo or Cambridge), one in Listowel and one in Guelph. The responding employer’s Operations Manager in its Kitchener office is responsible for all of these work sites. S/he is also responsible for employees at a site in Woodstock (in the County of Oxford). The same person is also the Operations Manager in the responding employer’s London office. The responding employer’s District Manager is responsible for both the Kitchener office and the London office. Of the twelve job sites affected by this application, six have full-time site supervisors and one has a “part-time” site supervisor. Other than the “patrol supervisors”, all employees are stationed at a particular job site.

5. The applicant submitted that the unit it proposed is an appropriate bargaining unit and that the responding employer’s proposed unit is not. The applicant pointed out that the Board need not determine what the best bargaining unit would be and that if the applicant’s proposed bargaining unit was an appropriate one the applicant was entitled to it. The applicant observed that its proposed unit would constitute a contiguous geographic area and that the responding employer’s proposed unit would not. The applicant referred to two earlier decisions in which the Board had certified an applicant trade union for a bargaining unit described in the same way as the applicant proposes herein; namely, in terms of Regional Municipalities or Counties rather than individual municipalities (*Burns International Security Services Ltd.*, Board File No. 1681-92-R, decision dated October 8, 1992, unreported; *Canadian Protection Services Ltd.*, Board File No. 2924-92-R, decision dated March 23, 1993, unreported). The applicant argued that its proposed unit would avoid the fragmentation which the responding party’s proposed unit would result in, and, further, that the responding party’s proposed unit would impede effective collective bargaining. The applicant submitted that it was entitled to the bargaining unit of employees it had sought to organize and that the nature of the security industry is such that its bargaining unit would give the employees the applicant had organized the appropriate collective bargaining protection. The applicant submitted that the responding employer’s proposed bargaining unit would not. In the course of its submissions, the applicant referred to and relied on *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 and *Belkin Inc.*, [1986] OLRB Rep. Aug. 1050.

6. The responding employer pointed out that its proposed bargaining unit covers all of the employees the applicant seeks to represent herein. It submitted that its proposed bargaining unit would not result in fragmentation or other labour relations problems, either as suggested by the applicant or otherwise. The responding employer observed that the Board has certified bargaining units of security guards described in several different ways, including by municipality as it suggests herein, and argued that the Board has consistently rejected the kind of geographic description proposed by the applicant where the parties did not agree to it. The responding employer argued that the applicant was now seeking more than it had applied for or was entitled to and that the applicant's bargaining unit was therefore not an appropriate one. The responding employer referred to and relied on *Perimeter Industries Limited*, [1973] OLRB Rep. March 174; *York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293; *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656; *Kuehne & Nagel International Limited*, [1985] OLRB Rep. May 693 and *Coca Cola Ltd.*, [1989] OLRB Rep. Jan. 1.

7. Upon considering the representations of the parties, the Board ruled, orally, in favour of the responding party.

8. In both *Burns International Security Services Ltd.*, *supra* and *Canadian Protection Services Ltd.*, *supra*, the parties had agreed on the geographic scope of the bargaining unit. These decisions demonstrate the Board's general willingness to accept agreements of the parties in that respect. They do not constitute or suggest a Board practice with respect to bargaining units of either security guards or other employees.

9. As the decisions cited by the responding employer demonstrate, it has long been the Board's general practice to describe bargaining units outside of the construction industry in terms of the municipality in which the workplace(s) is (are) located. Although, like every practice or policy of the Board, this practice is not without its exceptions, the Board will generally not describe a bargaining unit in terms of some broader or narrower geographic area unless it is satisfied that there is good reason to do so in a particular case. In the result, exceptions to the practice are rare. The Board's practice in this respect reflects an attempt to balance considerations of viability or rationality of bargaining units against the right of employees to freely organize themselves. It also provides a measure of predictability to the labour relations community.

10. In this case, the Board was not satisfied that it was appropriate for the bargaining unit to be given the broad geographic scope suggested by the applicant. Accordingly, the applicant's proposed bargaining unit is not an appropriate one in this case. On the other hand, the Board was satisfied that the responding employer's bargaining unit is an appropriate one.

11. Neither proposed unit was congruent with the responding employer's organizational structure. It did not appear necessary to extend the bargaining unit configuration to the Regional or County level in order to protect any legitimate collective bargaining interest. On the other hand, the broader geographic boundaries would extend the bargaining beyond that which the applicant had sought to organize and could impair the rights of future employees under section 3 of the Act.

12. The responding employer was not attempting to split up the employees for whom the applicant sought bargaining rights. Nor was it seeking to carve out any employees which the applicant sought to organize. On the contrary, the responding employer's proposed unit represented the unit which was the target of the applicant's organizing campaign. The responding employer's proposed unit did not raise any fragmentation issue and was consistent with the Board's long-standing practice of describing (non-construction) bargaining units with reference to municipal boundaries.

13. In the result, the Board ruled that the applicant's proposed bargaining unit was not an

appropriate one in this case. The Board further ruled that the responding employer's proposed unit was an appropriate one and found that; all security guards of Wackenhut of Canada Limited in the City of Kitchener, the City of Waterloo, the City of Cambridge, the Town of Listowel and the City of Guelph, save and except patrol supervisors, persons above the rank of patrol supervisor, dispatchers, office, clerical and sales staff, and (pending resolution by the Board) *excluding also site supervisors, and Robert Hertzberger and Lyle Ruby who are classified as patrol supervisors*, constitute a unit of employees of the responding party appropriate for collective bargaining.

14. There remained a dispute between the parties with respect to the list of employees in the bargaining unit. the applicant asserts that Robert Hertzberger, Lyle Ruby (both classified as "patrol supervisors"), Brady James, Cecil McClory, Glen Parrest, Thomas Riggs and Ronald Sanvido (all classified as "site supervisors") are in the bargaining unit. The responding employer asserts that all of these persons exercise managerial functions and should therefore be deemed not to be "employees", pursuant to section 1(3) of the Act. The responding employer submits that they are therefore not properly included in the bargaining unit.

15. The applicant had taken the position that the Board should deal with the employee list issues directly. The responding party has suggested that the Board should follow its usual practice and authorize a Labour Relations Officer to inquire into and report to the Board in that respect. For the first time at the hearing on April 19, 1993, and without any prior notice to the responding employer, the applicant advised the Board that it had changed its mind and now agreed that the list issues could be referred to an Officer. The responding employer had come to the hearing prepared to deal with the list issues and expressed its understandable frustration at this turn of events. Nevertheless, the responding employer agreed that the list issues should be dealt with through the Board's Labour Relations Officer process as it had originally suggested.

16. Upon reviewing the material before the Board, it was apparent that the disposition of the list issues could not affect the applicant's rights to be certified herein. Whether or not any of the persons in issue were employees in the bargaining unit for purposes of this application, more than fifty-five per cent of the employees of the responding party in the bargaining unit, at the time the application was made, were members of the applicant on February 22, 1993, which is both the application date and the date which the Board determines, under section 105(2)(j) of the *Labour Relations Act*, to be the time at which membership is ascertained under section 8(1) of the Act.

17. In the circumstances, the Board ruled, orally, that it found it appropriate to exercise its discretion under section 6(2) of the *Labour Relations Act* to certify the applicant on an interim basis as the bargaining agent for the employees in the bargaining unit described in paragraph 13, above, pending the final resolution of the matters remaining in dispute between the parties herein.

18. We note that there is no interim certification "document" which will issue other than this decision (see, *P & M Electric Limited*, [1989] OLRB Rep. Oct. 1064; for a discussion of the Board's practice in this respect and the effect of interim certification in general see *Comstock Funeral Home Ltd.*, [1982] OLRB Rep. Oct. 1436).

19. With respect to the matters remaining in issue, the Board authorizes a Labour Relations Officer to be designated by the Board's Manager of Field Services, to inquire into and report to the Board with respect to the duties and responsibilities of Robert Hertzberger, Lyle Ruby, Brady James, Cecil McClory, Glen Parrest, Thomas Riggs and Ronald Sanvido.





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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1993

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**1779-91-R:** Ontario Nurses' Association (Applicant) v. The Doctors Hospital, Toronto (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by The Doctors Hospital, Toronto, in Metropolitan Toronto, save and except Managers, persons above the rank of Manager, and persons regularly employed for not more than 24 hours per week" (146 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity for not more than 24 hours per week by The Doctors Hospital, Toronto, in Metropolitan Toronto, save and except Managers and persons above the rank of Manager" (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3123-91-R:** Ontario Public Service Employees Union (Applicant) v. County of Bruce General Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the County of Bruce General Hospital in the County of Bruce, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate, undergraduate and registered nurses, paramedical employees, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (62 employees in unit) (*Having regard to the agreement of the parties*)

**3692-91-R:** United Steelworkers of America (Applicant) v. Ivaco Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all office, clerical and technical employees of Ivaco Inc. at its Ivaco Rolling Mills division in the Township of Longueuil (L'Orignal) save and except supervisors and forepersons, persons above the rank of supervisor and foreperson, professional engineers within the meaning of the Labour Relations Act, training co-ordinator, sales representatives, secretary to the General Manager, secretary to the Manager of Personnel and Industrial Relations, Head Nurse, Payroll Co-ordinator, Raw Materials Co-ordinator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (66 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0794-92-R:** International Brotherhood of Electrical Workers, Local 120 (Applicant) v. 811242 Ontario Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of 811242 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 811242 Ontario Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0909-92-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Avery Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Avery Construction Limited in the industrial, commercial

and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Avery Construction Limited in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**1032-92-R:** The International Ladies' Garment Workers' Union (Applicant) v. Chinese Information and Community Services (Respondent)

Unit #1: "all employees of Chinese Information and Community Services in the Municipality of Metropolitan Toronto, save and except Program Director and Executive Director, persons above the rank of Program Director and Executive Director, Senior Secretary to the Executive Director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit)

Unit #2: "all employees of Chinese Chinese Information and Community Services in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Program Director and Executive Director, persons above the rank of Program Director and Executive Director and Senior Secretary to the Executive Director" (3 employees in unit)

**1306-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Provincial Store Fixtures Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Provincial Store Fixtures Limited, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Provincial Store Fixtures Limited, in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

**1689-92-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Fern Godmaire Masonry Ltd. (Respondent)

Unit: "all construction labourers in the employ of Fern Godmaire Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Fern Godmaire Masonry Ltd. in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"

**2221-92-R:** Service Employees International Union, Local 183 (Applicant) v. Cordyte Nursing Services Ltd., 5M Management Services Ltd., Meadowcroft Management Group and Briargate Retirement Centre (Respondents)

Unit: "all employees of Meadowcroft Management Group in the Township of Ernestown, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

**2887-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Metropolitan Toronto Condominium Corporation, No. 983 (Respondent)

Unit: "all employees of Metropolitan Toronto Condominium Corporation, No. 983 engaged in cleaning and maintenance at River Ridge Condominiums, 1 and 3 Hickory Tree Road, Metropolitan Toronto, save and except resident superintendents, persons above the rank of resident superintendent, security staff, clerical and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

**2902-92-R:** International Brotherhood of Painters and Allied Trades, Local 1795 (Applicant) v. Polar Glass & Mirror Inc. (Respondent)

Unit: "all employees of Polar Glass & Mirror Inc. in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

**2924-92-R:** United Steelworkers of America (Applicant) v. Canadian Protection Services Ltd. (Respondent)

Unit: "all employees of Canadian Protection Services Ltd. in the County of Wellington and the Regional Municipality of Waterloo, save and except field supervisors, persons above the rank of field supervisor, dispatchers, office, clerical and sales staff." (79 employees in unit)

**2950-92-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Lakefield (Respondent)

Unit: "all employees of The Corporation of the Village of Lakefield, save and except Public Works Foreman, the Director Public Works/C.B.O., Director Parks and Recreation, Clerk/Director Information, Deputy-Treasurer/Tax Collector, persons above the rank of Director Public Works/C.B.O., Director Parks and Recreation, Clerk/Director Information, Deputy-Treasurer/Tax Collector, secretary to the C.A.O. and Director of Information and students employed during the school vacation period" (13 employees in unit) (*Having regard to the agreement of the parties*)

**3051-92-R:** United Steelworkers of America (Applicant) v. Hemlo Gold Mines Inc. (Respondent) v. Group of Employees (Intervenors)

Unit: "all employees of Hemlo Gold Mines Inc. located approximately 36.5 kilometres east of the town of Marathon, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, sales, security staff and students employed during the school vacation period" (225 employees in unit)

**3084-92-R:** London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Salvation Army Addiction and Rehabilitation Services Centre (Respondent)

Unit: "all employees of The Salvation Army Addiction and Rehabilitation Services Centre in the City of London, save and except supervisors, Program Co-ordinator, persons above the rank of Program Co-ordinator, office clerk and Accountant" (36 employees in unit) (*Clarity Note*)

**3129-92-R:** Bakery, Confectionery and Tobacco Worker's International Union (Applicant) v. Pinkerton's of Canada Limited (Respondent)

Unit: "all Security Guards employed by Pinkerton's of Canada Limited at Imperial Leaf Tobacco in the Town of Aylmer, save and except supervisors and persons above the rank of supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

**3150-92-R:** United Steelworkers of America (Applicant) v. Senator Hotel Limited (Respondent)

Unit: "all employees of Senator Hotel Limited in the City of Sudbury, save and except department heads, persons above the rank of department head, office and sales staff and employees in the bargaining units for which any trade union held bargaining rights as of February 2, 1993" (27 employees in unit) (*Having regard to the agreement of the parties*)

**3227-92-R:** United Food & Commercial Workers International Union Local 175 (Applicant) v. 561270 Ontario Inc. operating as LOEB St. Laurent (Respondent)

Unit: "all employees of 561270 Ontario Inc. operating as LOEB St. Laurent in the City of Gloucester, save and except Store Manager, persons above the rank of Store Manager, Office Manager and persons for whom any trade union held bargaining rights as of February 2, 1993" (7 employees in unit) (*Having regard to the agreement of the parties*)

**3231-92-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Rowad Pipeline Company Ltd. (Respondent)

Unit: “all employees of Rowad Pipeline Company Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, and employees engaged as surveyors in that portion of the District of Cochrane north of the 50th parallel of latitude, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**3243-92-R:** Independent Canadian Transit Union (Applicant) v. Olympia and York Developments Limited (Respondent)

Unit: “all security guards of Olympia and York Developments Limited at L’Esplanade Laurier in the City of Ottawa, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3254-92-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Commercial Alcohols Inc. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Commercial Alcohols Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Commercial Alcohols Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

**3261-92-R:** Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Imperial Optical Company Ltd. (Respondent) v. United Headwear, Optical and Allied Workers Union of Canada, Local 4 (Intervener)

Unit: “all employees of Imperial Optical Company Ltd. in its prescription laboratories in Metropolitan Toronto and at 2550 Goldenridge Road, Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (49 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3263-92-R:** International Union of Bricklayers and Allied Craftsmen, Local No. 7 (Applicant) v. Canvar Construction (1991) Inc. (Respondent)

Unit: “all bricklayers and bricklayers’ apprentices in the employ of Canvar Construction (1991) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers’ apprentices in the employ of Canvar Construction (1991) Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**3273-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Harbour Channel Housing Co-Operative Inc. (Respondent)

Unit: “all employees of Harbour Channel Housing Co-Operative Inc. in the Municipality of Metropolitan Toronto, save and except Directors and persons above the rank of Director” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3275-92-R:** International Ladies Garment Workers Union (Applicant) v. 717536 Ontario Inc. c.o.b. as 2001 Futon and 2001 Futon Inc. (Respondent)

Unit: “all employees of 717536 Ontario Inc. c.o.b. as 2001 Futon and 2001 Futon Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, truck drivers and receivers” (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3292-92-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Bilow’s Raceway Auto Parts Inc. (Respondent)

Unit: “all employees of Bilow’s Raceway Auto Parts Inc. in the Township of Kingston, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

**3293-92-R:** London & District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Double M & M Inc. (Respondent)

Unit: “all employees of Double M & M Inc. in the City of Stratford, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (31 employees in unit) (*Having regard to the agreement of the parties*)

**3294-92-R:** London & District Service Workers’ Union Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Women’s Emergency Centre (Woodstock) Inc. (Respondent)

Unit: “all employees of the Women’s Emergency Centre (Woodstock) Inc. in the City of Woodstock, save and except supervisors, persons above the rank of supervisor, office and clerical staff and bookkeeper” (9 employees in unit) (*Having regard to the agreement of the parties*)

**3368-92-R:** United Food and Commercial Workers Union, Local 175 (Applicant) v. Tilden Car Rental Inc. (Respondent)

Unit: “all employees of Tilden Car Rental Inc. employed as Rental Agents at Pearson International Airport in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (25 employees in unit) (*Having regard to the agreement of the parties*)

**3369-92-R:** Ontario Public Service Employees Union (Applicant) v. Dalmar Foods Limited (Respondent)

Unit: “all employees of Dalmar Foods Limited at the Ontario Correctional Institute in the City of Brampton, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of February 11, 1993” (9 employees in unit) (*Having regard to the agreement of the parties*)

**3412-92-R:** United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. (Respondent)

Unit #1: “all security guards employed by Barnes Security Services Ltd. in the Regional Municipality of Ottawa-Carleton, save and except Field Supervisors, persons above the rank of Field Supervisor, dispatchers, office, clerical and sales staff, private investigators and persons employed for not more than 24 hours per week” (149 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: (see Applications for Certification Dismissed without vote)

**3413-92-R:** Retail, Wholesale and Department Store Union (Applicant) v. Ray Beland Distributors Ltd. (Respondent)

Unit: “all employees of Ray Beland Distributors Ltd. at and out of the Regional Municipality of Sudbury, save and except managers and persons above the rank of manager” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3417-92-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Applicant) v. Jade Reclamation Ltd. (Respondent)

Unit: “All employees of Jade Reclamation Ltd. in the Town of Tillsonburg, save and except forepersons

persons above the rank of foreperson, office staff, clerical staff and sales staff.” (13 employees in unit) (*Having regard to the agreement of the parties*)

**3421-92-R:** International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Cameron-McIndoo Construction Inc. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Cameron-McIndoo Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Cameron-McIndoo Construction Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Clarity Note*)

**3422-92-R:** IWA-Canada (Applicant) v. Gilles R. Mayer Sanitation Ltee. (Respondent)

Unit: “all employees of Gilles R. Mayer Sanitation Ltee. in the Town of Hawkesbury, save and except foremen, persons above the rank of foreman, office and clerical staff and persons regularly employed for not more than 24 hours per week” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3439-92-R:** International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all security guards regularly employed by Burns International Security Devices Limited at or out of the City of Peterborough for not more than 24 hours per week, save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff, and students employed during the school vacation period” (18 employees in unit) (*Having regard to the agreement of the parties*)

**3444-92-R:** Service Employees International Union, Local 204 (Applicant) v. Sanitary Maintenance Systems (Respondent)

Unit: “all employees of Sanitary Maintenance Systems employed at 1 Adelaide St. East, in the City of Toronto, save and except forepersons and persons above the rank of foreperson” (32 employees in unit) (*Having regard to the agreement of the parties*)

**3458-92-R:** Brewery, General and Professional Workers Union (Applicant) v. Neighbourhood Legal Services (London & Middlesex) Inc. (Respondent)

Unit #1: “all employees of the Neighbourhood Legal Services (London & Middlesex) Inc., in the City of London, save and except the Executive Director, persons above the rank of Executive Director, the Administrative Assistant to the Executive Director and Staff Lawyers” (4 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all Staff Lawyers of the Neighbourhood Legal Services (London & Middlesex) Inc., save and except the Executive Director and persons above the rank of Executive Director” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3467-92-R:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. 680247 Ontario Ltd. c.o.b. as Comfort Inn Airport (Respondent)

Unit: “all employees of 680247 Ontario Ltd. c.o.b. as Comfort Inn Airport in the City of Etobicoke, save and except supervisors, persons above the rank of supervisor and sales staff” (18 employees in unit)

**3477-92-R:** Canadian Union of Public Employees (Applicant) v. The Christian and Missionary Alliance Eastern and Central Canadian District operating as Cama Woodlands (Respondent)

Unit: “all employees of the Christian and Missionary Alliance Eastern and Central Canadian District operating as Cama Woodlands in the City of Burlington, save and except supervisors, persons above the rank of

supervisor, Registered and Graduate Nurses, office and clerical staff and Chaplaincy staff” (42 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3491-92-R:** Laundry and Linen Drivers and Industrial Workers Union, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Biltmore Corporation (Respondent) v. United Headwear, Optical and Allied Workers Union of Canada, Local 3 (Intervener)

Unit: “all employees of Biltmore Corporation in the City of Guelph, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

**3495-92-R:** Ontario Public Service Employees Union (Applicant) v. Children’s Aid Society of the Regional Municipality of Waterloo (Respondent)

Unit: “all office and clerical employees of the Children’s Aid Society of the Regional Municipality of Waterloo regularly employed for not more than twenty-four hours per week in the Regional Municipality of Waterloo, save and except Executive/Human Resources Secretary, HOPES Co-ordinator, Team Leaders, Management Information Systems Administrator, Personnel Officer, Program Supervisors, persons above the rank of Program Supervisor, Comptroller, maintenance and cleaning staff and employees in bargaining units for which any trade union held bargaining rights as of February 26, 1993” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3500-92-R:** United Steelworkers of America (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all employees of Burns International Security Services Limited in the Regional Municipality of Ottawa-Carleton, save and except guard inspectors and persons above the rank of guard inspector, dispatchers, and office, clerical and sales staff” (137 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3502-92-R:** Practical Nurses Federation of Ontario (Applicant) v. Quadrille Development Corporation c.o.b. as Residence on the Thames (Respondent)

Unit: “all employees of Quadrille Development Corporation c.o.b. as Residence on the Thames employed in a nursing capacity as Registered and Graduate Nursing Assistants in the City of Chatham, save and except Supervisors and persons above the rank of Supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

**3515-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Toronto Montessori Schools (Respondent)

Unit: “all employees of Toronto Montessori Schools in the Municipality of Metropolitan Toronto, save and except Office Managers, persons above the rank of Office Manager, student teachers and persons for whom any trade union held bargaining rights as of March 2, 1993” (4 employees in unit) (*Having regard to the agreement of the parties*)

**3536-92-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Gatecross Construction Ltd. (Respondent) v. International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Intervener)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Gatecross Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of Gatecross Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of

Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**3542-92-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Concorde Maintenance Corp. (Respondent)

Unit: “all employees of Concorde Maintenance Corp. engaged in cleaning and maintenance at Union Station, 97 Front Street West, Toronto, save and except non-working supervisors, persons above the rank of non-working supervisor, office and clerical staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

**3543-92-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Concorde Maintenance Corp. (Respondent)

Unit: “all employees of Concorde Maintenance Corp. engaged in cleaning and maintenance at 1 Front Street West, Toronto, save and except non-working supervisors, persons above the rank of non-working supervisors, office and clerical staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

**3551-92-R:** Laundry and Linen Drivers and Industrial Workers, Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Metro Toronto Condominium Corporation #770 (Respondent)

Unit: “all employees of Metro Toronto Condominium Corporation #770 at 3559 Eglinton Avenue, West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

**3558-92-R:** Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. St. Joseph’s General Hospital (Respondent)

Unit: “all employees of St. Joseph’s General Hospital at the Smith Alcohol and Drug Dependency Clinic in Thunder Bay, save and except Program Co-ordinators, persons above the rank of Program Co-ordinator, members of the Congregation of the Sisters of Sault Ste. Marie and employees in bargaining units for which any trade union held bargaining rights as of March 3, 1993” (36 employees in unit) (*Having regard to the agreement of the parties*)

**3564-92-R:** Canadian Union of Public Employees (Applicant) v. Ajax-Pickering & Whitby Association of Community Living (Respondent)

Unit: “all employees of Ajax-Pickering Whitby Association for Community Living in the Municipalities of Ajax, Pickering and Whitby regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (62 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3569-92-R:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 895657 South Mitchell Holdings Limited c.o.b. as LOEB Club Plus Woodstock (Respondent)

Unit: “all employees of 895657 South Mitchell Holdings Limited c.o.b. as LOEB Club Plus Woodstock in the Town of Woodstock, save and except Store Owners, Store Manager: LOEB Fresh, Store Manager: LOEB Ready, Store Manager: Grocery, Store Manager: Service and persons above the rank of Store Manager: LOEB Fresh, Store Manager: LOEB Ready, Store Manager: Grocery, Store Manager: Service, office and clerical staff” (109 employees in unit) (*Having regard to the agreement of the parties*)

**3577-92-R:** International Association of Machinists and Aerospace Workers (Applicant) v. R. Theta Inc. (Respondent)

Unit: “all employees of R. Theta Inc. employed at 5672 McAdam Road in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office, clerical and technical employees and sales staff” (45 employees in unit) (*Having regard to the agreement of the parties*)

**3587-92-R: Canadian Union of Public Employees (Applicant) v. Double M and M Inc. (Respondent)**

Unit: "all employees of Double M and M Inc. in the County of Essex, save and except Job Manager and persons above the rank of Job Manager" (48 employees in unit)

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote****2913-92-R: Canadian Union of Public Employees (Applicant) v. Oshawa Young Women's Christian Association (Respondent)**

Unit: "All employees of the Oshawa Young Women's Christian Association at the responding party's residences in the City of Oshawa, save and except Executive Director, Manager, Housing Director, Assistant Housing Director, 55 Manager, Program Director, Program Co-ordinators, Instructors, Family Counsellors, office and clerical staff, students employed in a co-operative training program and students employed during the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	10

**3121-92-R: Canadian Security Union (Applicant) v. Ensign Security Services Ltd. (Respondent)**

Unit: "all employees of Ensign Securities Services Ltd. in the Regional Municipality of Ottawa-Carleton, save and except site supervisors and persons above the rank of site supervisor" (41 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	0

**Applications for Certification Dismissed Without Vote**

**2973-90-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Mike Weber's Construction Company Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081 (Intervener) (5 employees in unit)**

**1562-92-R: Syndicat des Employées et Employés Professionnels-les et de Bureau, Section locale 57 (OPEIU) CLC (Applicant) v. Télé-Direct (Publications) Inc. (Respondent) v. Canadian Telephone Employees' Association (Intervener) (7 employees in unit)**

**1563-92-R: Syndicat des Employées et Employés Professionnels-les et de Bureau, Section locale 57 (OPEIU) CLC (Applicant) v. Télé-Direct (Publications) Inc. (Respondent) v. Canadian Telephone Employees' Association (Intervener) (13 employees in unit)**

**2914-92-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Voyageur Limousine and Van Service and 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) (4 employees in unit)**

**3069-92-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Montage d'Acier International Inc. (Respondent) (12 employees in unit)**

**3258-92-R:** United Steelworkers of America (Applicant) v. Ensign Security Ltd. (Respondent) (38 employees in unit)

**3264-92-R:** International Union of Bricklayers and Allied Craftsmen, Local No. 7 (Applicant) v. Canvar Group (Respondent) (2 employees in unit)

**3412-92-R:** United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all security guards regularly employed by Barnes Security Services Ltd. for not more than 24 hours per week in the Regional Municipality of Ottawa-Carleton, save and except Field Supervisors, persons above the rank of Field Supervisor, dispatchers, office, clerical and sales staff and private investigators" (37 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**2954-92-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Culligan Water Conditioning (Barrie) Ltd. (Respondent)

Unit: "all employees of Culligan Water Conditioning (Barrie) Ltd. in the City of Barrie and the Town of Aurora, save and except supervisors, persons above the rank of supervisor, office and sales staff," (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

**3267-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Toronto Montessori Schools (Respondent)

Unit: "all employees of Toronto Montessori Schools in the Town of Richmond Hill, save and except Head, those above the rank of Head, Student Teachers, office, clerical, custodial staff and substitutes" (51 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	1

### Applications for Certification Withdrawn

**2451-89-R:** United Brotherhood of Carpenters and Joiners of America Union Local 785 (Applicant) v. 397940 Ontario Limited c.o.b. as Blair Construction Eastern (Respondent) v. Group of Employees (Objectors)

**1629-91-R:** The International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Grant Development Corporation (Respondent) v. Group of Employees (Objectors)

**3510-91-R:** United Food and Commercial Workers International Union Local 175 (Applicant) v. Supermarket D. Conley Inc. (Respondent)

**3511-91-R:** United Food and Commercial Workers International Union Local 175 (Applicant) v. Francois Bouchard Supermarket Inc. (Respondent)

**3513-91-R:** United Food and Commercial Workers International Union Local 175 (Applicant) v. Michael Drouin Supermarket Inc. (Respondent)

**3519-91-R:** United Food and Commercial Workers International Union Local 175 (Applicant) v. Bright Supermarket Inc. (Respondent)

**2782-92-R:** Teamsters Local Union 938 (Applicant) v. Rodgers School of Truck Driver Training Ltd. (Respondent)

**2971-92-R:** Retail, Wholesale and Department Store Union AFL:CIO:CLC: (Applicant) v. 895657 South-Mitchell Holdings Limited c.o.b. as LOEB CLUB Plus Woodstock (Respondent)

**3058-92-R:** Ontario Secondary School Teachers' Federation (Applicant) v. Carleton Board of Education (Respondent) v. Carleton Administration Support Certified Employees Association (Intervener)

**3140-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Liffey Custom Coatings Inc. (Respondent)

**3228-92-R:** Service Employees Union, Local 210 (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, operating as St. Joseph's Hospital, Chatham, Ontario (Respondent)

**3376-92-R:** United Food and Commercial Workers Union, Local 206 (Applicant) v. Parkway Lanes (St. Catharines) Ltd. (Respondent) v. Group of Employees (Objectors)

**3391-92-R:** United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Qualico Foods (Respondent) v. Group of Employees (Objectors)

**3407-92-R:** Service Employees International Union, Local 532 affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Aikman Lodge (Respondent) v. Group of Employees (Objectors)

**3490-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Township of Innisfil (Respondent)

**3513-92-R:** Canadian Union of Operating Engineers & General Workers Local 100 (Applicant) v. Cold Springs Farm Ltd. (Respondent)

**3557-92-R:** Office and Professional Employees International Union (Applicant) v. Women-In-Crisis - Sioux, Hudson & North (Respondent)

**3687-92-R:** Labourers' International Union of North America, Local 1089 (Applicant) v. 405730 Ontario Ltd. c.o.b. as Hiawatha Horse Park (Respondent)

## APPLICATION FOR COMBINATION OF BARGAINING UNITS

**2923-92-R:** United Steelworkers of America (Applicant) v. Canadian Protection Services Limited (Respondent)

Unit: "all employees of the respondent in the Counties of Wellington and Perth and the Regional Municipality of Waterloo, save and except Field Supervisors, persons above the rank of field supervisor, dispatchers, office, clerical and sales staff" (*Withdrawn*)

**3144-92-R; 3146-92-R:** Carleton Board of Education (Applicant) v. Carleton Administrative Support Certified Employees Association (Respondent)

Unit: “all office, clerical and technical employees of the Carleton Board of Education in the Regional Municipality of Ottawa-Carleton save and except persons employed in a managerial or confidential capacity, employees for which a trade union held bargaining rights on the date of application, students employed during the vacation period or on a co-operative work placement and temporary and casual employees” (*Withdrawn*)

**3364-92-R:** The Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Ingersoll (Respondent)

Unit: “combined employees of the Public Works and Parks and Recreation Departments all employees thereof” (*Withdrawn*)

**3372-92-R:** International Ladies’ Garment Workers’ Union (Applicant) v. Simmons Canada Inc. (Respondent)

Unit #1: “all employees of Simmons Canada Inc., in the City of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and quality assurance co-ordinator.” (*Granted*)

**3440-92-R:** International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all security guards employed by Burns International Security Services Limited at or out of the City of Peterborough save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff, and students employed during the school vacation period” (*Granted*)

## APPLICATIONS FOR FIRST CONTRACT ARBITRATION

**2533-92-FA:** The Public Service Alliance of Canada (Applicant) v. The Board of Directors of Multicultural Assistance Services of Peel (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2607-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated and Serbean Inc. (Respondents) (*Terminated*)

**0920-92-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Elite Construction Supplies and Caledonia Equipment Centre (Respondents) (*Withdrawn*)

**1128-92-R:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. IPCF Properties Inc.; Twins Drive Inn Inc. (Respondents) (*Granted*)

**1376-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Guillot Builders Limited, Great North Claim Services Inc. and 900273 Ontario Inc. (Respondents) v. Labourers’ International Union of North America, Ontario Provincial District Council, International Brotherhood of Painters and Allied Trades (Intervenors) (*Withdrawn*)

**1517-92-R:** International Brotherhood of Electrical Workers, Local Union 115 (Applicant) v. Laurier Electric Limited and Atlas Power Systems Ltd. (Respondents) (*Dismissed*)

**1592-92-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Tor-Wood Electric Ltd. and B.F.R. Electrical Contractors Ltd. (Respondents) (*Granted*)

**2253-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Acadia Maintenance Company Inc. and Cambridge Leaseholds Limited (Respondents) (*Withdrawn*)

**2295-92-R:** United Brotherhood of Carpenters and Joiners of America Local 249, United Brotherhood of

Carpenters and Joiners of America Local 785 (Applicants) v. Duet Interior Systems, Helm Interiors, Helm Acoustical Drywall Co. Ltd., Helm Bros. Contracting Ltd. (Respondents) (*Granted*)

**2316-92-R:** Ontario Liquor Boards Employees' Union (Applicant) v. DFS Canada Limited and/or Allders International (Canada) Limited (Respondents) v. Service Employees' International Union Local 204 (Intervener) (*Withdrawn*)

**2341-92-R:** International Brotherhood of Electrical Workers, Local Union 115 (Applicant) v. J. C. Electric and V. C. Electric Ltd. (Respondents) (*Withdrawn*)

**2418-92-R:** International Union of Bricklayers and Allied Craftsmen Local No. 7, Ottawa-Hull (Applicant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Ricoll Limited (Respondents) (*Withdrawn*)

**2423-92-R:** Toronto-Central Ontario Building and Construction Trades Council, on behalf of its affiliated unions, Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, and Labourers' International Union of North America, Local 506 (Applicants) v. Bradsil Limited, Bradsil (1967) Limited, Bradsil (1980) Limited, Bradscot Construction Limited, Bradscot Limited, Bradscot Management Limited and Bradsil Leaseholds Limited (Respondents) (*Withdrawn*)

**2470-92-R:** Service Employees International Union, Local 183 (Applicant) v. Cordyte Nursing Services Ltd., 5M Management Services Ltd., Meadowcroft Management Group and Briargate Retirement Centre (Respondents) (*Granted*)

**2709-92-R:** Ontario Provincial Conference of the International Union of Bricklayers and The International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. A. Gorgi Masonry (1976) Limited or 348816 Ontario Ltd., Gorgi Construction Ltd., Gorgi Masonry Ltd., 993415 Ontario Limited c.o.b. as J.D. Masonry (Respondents) (*Granted*)

**2710-92-R:** Labourers International Union of North America, Ontario Provincial District Council, Labourers International Union of North America, Local 1081 (Applicants) v. A. Gorgi Masonry (1976) Limited or 348816 Ontario Ltd., Gorgi Construction Ltd., Gorgi Masonry Ltd., 993415 Ontario Limited c.o.b. as J.D. Masonry (Respondents) (*Granted*)

**2718-92-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Mapleton Electric Limited and/or Maza Electric Ltd. (Respondents) (*Granted*)

**2804-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Walter Gradasevic carrying on business as City Interior Company, E.G. Interior General Contracting Ltd. (Respondents) (*Withdrawn*)

**2893-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Alpha Foundation Forming Corporation and Alpha Concrete Forming Corporation Limited (Respondents) (*Granted*)

**3026-92-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. Terrence A. Jamieson, Mohawk Services, Eagle Erection Services Ltd. (Respondents) (*Withdrawn*)

**3304-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Viva Painting Co. Ltd. and Grand Painting Ltd. (Respondents) (*Withdrawn*)

**3305-92-R:** Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Bobotan Tiles Limited and Yorkland Interior Systems Ltd. (Respondent) (*Granted*)

**3307-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Two Star Drywall Company Ltd. and Royalcrest Drywall & Construction Co. Ltd. (Respondents) (*Withdrawn*)

**3352-92-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Perwin Construction Co. Limited, Perwin Project Management Inc., The Ontario Camp for the Deaf (Respondents) (*Granted*)

**3353-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Michel Tremblay and Innovation Drywall Inc. (Respondents) (*Dismissed*)

## SALE OF A BUSINESS

**2608-91-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated and Serbcan Inc. (Respondents) (*Terminated*)

**0920-92-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Elite Construction Supplies and Caledonia Equipment Centre (Respondents) (*Withdrawn*)

**1127-92-R:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. IPCF Properties Inc.; Twins Drive Inn Inc. (Respondents) (*Granted*)

**1376-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Guillot Builders Limited, Great North Claim Services Inc. and 900273 Ontario Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council, International Brotherhood of Painters and Allied Trades (Intervenors) (*Withdrawn*)

**1516-92-R:** International Brotherhood of Electrical Workers, Local Union 115 (Applicant) v. Laurier Electric Limited and Atlas Power Systems Ltd. (Respondents) (*Withdrawn*)

**1592-92-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Tor-Wood Electric Ltd. and B.F.R. Electrical Contractors Ltd. (Respondents) (*Granted*)

**1896-92-R:** United Food and Commercial Workers International Union, Local 175/633 (Applicant) v. Penny Lane Food Markets Ltd. (Respondent) v. Group or Employees (Objectors) (*Granted*)

**2254-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Acadia Maintenance Company Inc. and Cambridge Leaseholds Limited (Respondents) (*Withdrawn*)

**2296-92-R:** United Brotherhood of Carpenters and Joiners of America Local 249, United Brotherhood of Carpenters and Joiners of America Local 785 (Applicants) v. Duet Interior Systems, Helm Interiors, Helm Acoustical Drywall Co. Ltd., Helm Bros. Contracting Ltd. (Respondents) (*Granted*)

**2316-92-R:** Ontario Liquor Boards Employees' Union (Applicant) v. DFS Canada Limited and/or Allders International (Canada) Limited (Respondents) v. Service Employees' International Union Local 204 (Intervener) (*Withdrawn*)

**2342-92-R:** International Brotherhood of Electrical Workers, Local Union 115 (Applicant) v. J. C. Electric and V. C. Electric Ltd. (Respondents) (*Withdrawn*)

**2418-92-R:** International Union of Bricklayers and Allied Craftsmen Local No. 7, Ottawa-Hull (Applicant) v. Olivieri Masonry Limited, Ottawa-Carleton Bricklaying and Masonry Limited, Ricoll Limited (Respondents) (*Withdrawn*)

**2423-92-R:** Toronto-Central Ontario Building and Construction Trades Council, on behalf of its affiliated unions, Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, and Labourers' International Union of North America, Local 506 (Applicant) v. Bradsil Limited, Bradsil (1967) Limited, Bradsil (1980) Limited, Bradscot Construction Limited, Bradscot Limited and Bradscot Management Limited and Bradsil Leaseholds Limited (Respondents) (*Withdrawn*)

**2709-92-R:** Ontario Provincial Conference of the International Union of Bricklayers and The International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. A. Gorgi Masonry (1976) Limited or 348816 Ontario Ltd., Gorgi Construction Ltd., Gorgi Masonry Ltd., 993415 Ontario Limited c.o.b. as J.D. Masonry (Respondents) (*Granted*)

**2710-92-R:** Labourers International Union of North America, Ontario Provincial District Council, Labourers International Union of North America, Local 1081 (Applicants) v. A. Gorgi Masonry (1976) Limited or 348816 Ontario Ltd., Gorgi Construction Ltd., Gorgi Masonry Ltd., 993415 Ontario Limited c.o.b. as J.D. Masonry (Respondents) (*Granted*)

**2718-92-R:** International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Mapleton Electric Limited and/or Maza Electric Ltd. (Respondents) (*Granted*)

**2804-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Walter Gradasevic carrying on business as City Interior Company, E.G. Interior General Contracting Ltd. (Respondents) (*Withdrawn*)

**2893-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Alpha Foundation Forming Corporation and Alpha Concrete Forming Corporation Limited (Respondents) (*Granted*)

**3026-92-R:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Applicant) v. Terrence A. Jamieson, Mohawk Services, Eagle Erection Services Ltd. (Respondents) (*Withdrawn*)

**3304-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Viva Painting Co. Ltd. and Grand Painting Ltd. (Respondents) (*Withdrawn*)

**3305-92-R:** Marble, Tile & Terrazzo Union, Local 31 (Applicant) v. Bobotan Tiles Limited and Yorkland Interior Systems Ltd. (Respondent) (*Granted*)

**3307-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Two Star Drywall Company Ltd. and Royalcrest Drywall & Construction Co. Ltd. (Respondents) (*Withdrawn*)

**3352-92-R:** Labourers' International Union of North America, Local 493 (Applicant) v. Perwin Construction Co. Limited, Perwin Project Management Inc., The Ontario Camp for the Deaf (Respondents) (*Granted*)

**3353-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Michel Tremblay and Innovation Drywall Inc. (Respondents) (*Dismissed*)

## **CROWN TRANSFER ACT**

**1883-90-R:** Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario as Represented by the Ministry of Transportation and Doughty Aggregates (Peterborough) Limited (Respondents) (*Granted*)

## **UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)**

**2676-92-R:** Communications and Electrical Workers of Canada (CWC) (Applicant) v. MacLean Hunter Communications (Respondent) (*Granted*)

**3291-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and its Local 504 (Applicant) v. Westinghouse Canada Inc. and Westinghouse Motor Company Canada Limited (Respondents) (*Granted*)

**3509-92-R:** United Brotherhood of Carpenters and Joiners of America Local 1072 (Applicant) v. Royal Homes Limited (Respondent) (*Granted*)

**3567-92-R:** Brewery, General and Professional Workers' Union (Applicant) v. Brewery, Malt and Soft Drink Workers, Local 304 (Respondent) (*Dismissed*)

**3630-92-R:** United Food and Commercial Workers Union, Local 1000A (Applicant) v. 564171 Ontario Ltd., conducting business as Dieter and Darcy's No Frills and Loblaw Companies Ltd. (Respondents) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2486-92-R:** Riverview Manor Nursing Home (Applicant) v. Ontario Nurses' Association (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Riverview Manor Nursing Home, save and except the Director of Nursing and persons above the rank of Director of Nursing" (9 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	0

**2803-92-R:** Ken Bell (Applicant) v. United Food & Commercial Workers Union (Respondent) v. Barber-Ellis Fine Papers, Division of Unisource Canada Inc. (Intervener)

Unit: "all warehouse employees of Barber-Ellis Fine Papers, London, Ontario, save and except office employees, salesmen, foremen and persons above the rank of supervisor" (21 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	20
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	16

**3104-92-R:** David Attaway (Applicant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Harding Carpet Ltd. (Intervener) (*Granted*)

**3201-92-R:** Ann Mary Cummings (Applicant) v. Service Employees Union Local 183 (Respondent) v. Congregation of the Sisters of St. Joseph (Intervener) (*Granted*)

**3355-92-R:** New-Vision Renovations (Applicant) v. Carpenters & Allied Workers Local 27 of the United Brotherhood of Carpenters & Joiners of America (Respondent) (*Dismissed*)

**3563-92-R:** Wayne M. Warren (Applicant) v. Teamsters Local 419 (Respondent) v. Western Automotive & Industrial Supplies (Intervener) (*Granted*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2554-89-U:** Labourer's International Union of North America, Ontario Provincial District Council (Applicant) v. 397940 Ontario Limited, c.o.b. as Blair Construction Eastern (Respondent) v. Group of Employees (Objectors) (*Terminated*)

**2996-89-U:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. 397940 Ontario Limited, c.o.b. as Blair Construction Eastern (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

**3161-90-U:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Mike Weber's Construction Company Limited (Respondent) (*Dismissed*)

**2020-91-U:** International Brotherhood of Electrical Workers', Local 1687 (Applicant) v. Grant Development Corporation (Respondent) (*Withdrawn*)

**2944-91-U:** Peterborough Typographical Union, Local 248, Printing, Publishing & Media Workers Sector Communications Workers of America (Applicant) v. Peterborough Examiner (Respondent) (*Terminated*)

**0027-92-U:** United Steelworkers of America (Applicant) v. Ivaco Inc. (Respondent) (*Dismissed*)

**0772-92-U:** Barbara Smith, Michelina Macri, Emilia Lepore (Applicants) v. The Toronto Cloakmakers, Dress and Sportswear District Council ILGWU, Local 83 (Respondent) (*Withdrawn*)

**0775-92-U:** William James Shepherd (Applicant) v. The Canadian Union of Public Employees and The Canadian Union of Public Employees, Local 16 (Respondents) v. Sault Ste. Marie Public Board of Education (Intervener) (*Dismissed*)

**0842-92-U:** Sharon Baillie-Jessop (Applicant) v. Canadian Union of Public Employees Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

**1029-92-U:** United Food and Commercial Workers Union, Local 633 (Applicant) v. LOEB, 581 Lake Street, St. Catharines, Ontario (Respondent) (*Withdrawn*)

**1263-92-U:** Istvan Kovacs (Applicant) v. United Steelworkers of America Local 16506 (Respondent) v. Thermal Ceramics, A Division of Morganite Canada Corporation (Intervener) (*Dismissed*)

**1506-92-U:** Victor Rochon (Applicant) v. United Steelworkers of America Local 6457 and The Peelle Company of Canada Limited (Respondents) (*Terminated*)

**1851-92-U:** United Food and Commercial Workers International Union, Local 1990 (Applicant) v. Primo Foods Limited (Respondent) (*Dismissed*)

**1937-92-U; 2702-92-U; 3319-92-U:** Christian Labour Association of Canada, Local 6 (Applicant) v. Kraken Electric Ltd. (Respondent); Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Applicant) v. Kraken Electric Ltd. (Respondent); Kraken Electric Ltd. (Applicant) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada (Respondent) (*Terminated*)

**2122-92-U:** Dan Herridge (Applicant) v. The Canadian Paperworkers Union, Local 528 and Domtar Inc. (Respondents) (*Withdrawn*)

**2233-92-U:** Utility Workers of Canada (Applicant) v. The Public Utilities Commission of the City of Scarborough (Respondent) (*Granted*)

**2252-92-U:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Acadia Maintenance Company Inc. and Cambridge Leaseholds Limited (Respondents) (*Withdrawn*)

**2300-92-U:** Robert Harry Macklin (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Respondent) (*Withdrawn*)

**2302-92-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 598537 Ontario Incorporated c.o.b. as Warner Pro Hardware (Respondent) (*Withdrawn*)

**2364-92-U:** Peter Murray (Applicant) v. Local 1081 Labourers International Union of North America; Labourers International Union of N.A. (Respondents) (*Dismissed*)

**2613-92-U:** Ontario Liquor Boards Employees' Union (Applicant) v. Allders International (Canada) Limited (Respondent) (*Withdrawn*)

**2703-92-U:** (Robert) James Saunders (Applicant) v. Labourers Local 1081 Cambridge & Ernesto Bairos (Business Manager) (Respondent) (*Dismissed*)

**2739-92-U:** Susan Porter (Applicant) v. Cupe Local 256 (Respondent) v. The Wellington County Board of Education (Intervener) (*Dismissed*)

**2776-92-U:** The Ontario Secondary School Teachers' Federation (Applicant) v. Leeds and Grenville County Board of Education (Respondent) (*Withdrawn*)

**2842-92-U:** Teamsters Local Union 938 (Applicant) v. Rodgers School of Truck Driver Training Ltd. (Respondent) (*Withdrawn*)

**2870-92-U:** Labourers' International Union of North America, Local 527 (Applicant) v. Beaver Road Builders Ltd. (Respondent) (*Withdrawn*)

**2881-92-U; 2882-92-U:** Bruce Hutton (Applicant) v. Domtar Packaging, a division of Domtar Inc. (Respondent) v. Independent Paperworkers of Canada; Canadian Paperworkers Union and its Local 934 (Interveners); Bruce Hutton (Applicant) v. Canadian Paperworkers Union C.L.C. Local 934 (Respondent) v. Domtar Packaging, a Division of Domtar Inc.; Independent Paperworkers of Canada (interveners) (*dismissed*)

**3020-92-U:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 895657 Ontario Incorporated c.o.b. as Loeb Club Plus Woodstock (Respondent) (*Withdrawn*)

**3022-92-U:** Alan Holder (Applicant) v. Brian Burke, President Local 6519, United Steelworkers of America and Michael Kershaw, Chairman Grievance Committee Local 6519, United Steelworkers of America and Brian Greenaway, Staff Representative United Steelworkers of America (Respondents) (*Withdrawn*)

**3028-92-U:** Ontario Liquor Boards Employees' Union (Applicant) v. Thousand Island Tax/Duty Free Store Ltd. (Respondent) (*Withdrawn*)

**3046-92-U:** Service Employees Union, Local 210 (Applicant) v. Marriott Food & Services Management (Respondent) (*Withdrawn*)

**3071-92-U:** Canadian Union of Public Employees Local 3578 (Applicant) v. United Counties of Stormont Dundas and Glengarry Social Services Department (Respondent) (*Withdrawn*)

**3089-92-U:** Ontario Public Service Employees Union (Applicant) v. Raoul Wallenberg Centre for Released Offenders (London) (Respondent) (*Dismissed*)

**3117-92-U:** James Clinton Handsor (Applicant) v. Bakery, Confectionery & Tobacco Workers' International Union (Local 264) (Respondent) v. Ingram and Bell (Intervener) (*Withdrawn*)

**3118-92-U:** Gus Tabas (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Toronto Airport Hilton International (Intervener) (*Dismissed*)

**3122-92-U:** Ontario Secondary School Teachers' Federation (Applicant) v. Carleton Board of Education, Carleton Administration Support Certified Employees (Respondents) (*Withdrawn*)

**3139-92-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Liffey Custom Coatings Inc. (Respondent) (*Withdrawn*)

**3141-92-U:** Robert T. Wing (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Electrical Power Systems Construction Association and Ontario Hydro (Interveners) (*Dismissed*)

**3180-92-U:** Vera N. Lukic (Applicant) v. Ontario Hydro - Construction - Pickering (Respondent) v. O.H.E.U., CUPE Local 1000 (Intervener) (*Dismissed*)

**3240-92-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647 (Applicant) v. Canada Bread Division of Corporate Foods Limited (Respondent) (*Withdrawn*)

**3246-92-U:** Labourers' International Union of North America, Local 1036 (Applicant) v. Shaw Milling Ltd. (Respondent) (*Withdrawn*)

**3301-92-U:** Ontario Public School Teachers Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent) (*Withdrawn*)

**3318-92-U:** Doug Pattison (Applicant) v. C.A.W. National Union, C.A.W., Local 707, Ford of Canada Ltd./Ltee. (Respondents) (*Withdrawn*)

**3324-92-U:** Service Employees Union, Local 210 (Applicant) v. Pinecrest Manor Nursing Home (Respondent) (*Withdrawn*)

**3340-92-U:** Borai Abdelrahman (Applicant) v. Jose Esqueda, Rajeev Khanduge of Delta Chelsea Inn Hotel (Respondents) (*Withdrawn*)

**3343-92-U:** Kong Lim (Applicant) v. Delta Chelsea Inn Management (Respondent) (*Withdrawn*)

**3345-92-U:** Nabil Abdelrahman - Room Service Senior Captain (Applicant) v. Delta Chelsea Inn Management (Respondent) (*Withdrawn*)

**3373-92-U:** Tony Rabaca (Applicant) v. Glen Myers - CAW, Doug Stewart/Carl Bos (Respondents) (*Terminated*)

**3377-92-U:** United Food and Commercial Workers Union, Local 206 (Applicant) v. Parkway Lanes (St. Catharines) Ltd. (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

**3398-92-U:** Canadian Union of Public Employees and its Local 2195 (Applicant) v. Youth Services Bureau of Ottawa (Respondent) (*Withdrawn*)

**3406-92-U:** Earl Austin Bowser (Applicant) v. John Caines, Dan Kewley (Respondents) (*Withdrawn*)

**3408-92-U:** United Food and Commercial Workers International Union, Locals 175/633 (Applicant) v. 810048 Ontario Limited c.o.b. as LOEB IGA Highland (Respondent) (*Withdrawn*)

**3418-92-U:** Office and Professional Employees International Union, Local 343 (Applicant) v. Graphic Communications International Union, Local 500-M (Respondent) (*Withdrawn*)

**3419-92-U:** Office and Professional Employees International Union, Local 343 (Applicant) v. International Brotherhood of Electrical Workers, Local 115 (Respondent) (*Withdrawn*)

**3428-92-U:** Azim Babu Ramji (Applicant) v. Metropolitan Toronto Convention Centre (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351-A (Intervener) (*Withdrawn*)

**3437-92-U:** United Steelworkers of America (Applicant) v. Tate Andale Canada Inc. (Respondent) (*Granted*)

**3443-92-U:** Service Employees International Union, Local 204 (Applicant) v. Sanitary Maintenance Systems (Respondent) (*Granted*)

**3453-92-U:** Teamsters Local Union No. 419 (Applicant) v. Rite Pak Produce Co. Limited (Respondent) (*Withdrawn*)

**3459-92-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Liffey Custom Coatings Inc. (Respondent) (*Withdrawn*)

**3461-92-U:** Vittore Di Girolamo (Applicant) v. Primo Foods Limited (Respondent) (*Withdrawn*)

**3473-92-U:** Faiz Bhuiyan (Applicant) v. Delta Chelsea Inn (Respondent) (*Withdrawn*)

**3480-92-U:** United Food and Commercial Workers International Union, Locals 175/633 (Applicant) v. Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. (Respondent) (*Withdrawn*)

**3487-92-U:** Saverio Simone (Applicant) v. C.A.W. Local 1967 (Respondent) v. McDonnell Douglas Canada Ltd. (Intervener) (*Withdrawn*)

**3512-92-U:** Keith Lang, and all Line Haul Drivers in Ontario & Quebec (Applicant) v. Canadian Pacific Express & Transport (CPET) & Transport-Communications Union (CLC) (Respondents) (*Dismissed*)

**3533-92-U:** Sookram Sookhoo (Applicant) v. Automotive Industries (Respondent) (*Withdrawn*)

**3544-92-U:** Francesco Di Roma (Applicant) v. Richvale York Masonry Group, a division of Lafarge Canada Inc. (Respondent) (*Withdrawn*)

**3545-92-U:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Procor Limited, Sarnia Car Repair Shop (Respondent) (*Withdrawn*)

**3547-92-U:** United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. Tilden Car Rental (Respondent) (*Withdrawn*)

**3554-92-U:** Office and Professional Employees International Union (Applicant) v. Ombudsman Ontario (Respondent) (*Withdrawn*)

**3559-92-U:** IWA-Canada, Local 2693 (Applicant) v. 549126 Ontario Limited, o/a Woodlands Inn (Respondent) (*Withdrawn*)

**3644-92-U:** Vincenza Nicolini (Applicant) v. Certified Brakes (Respondent) (*Dismissed*)

**3645-92-U:** Carleton Administrative Support Certified Employees Association (Applicant) v. The Carleton Board of Education, Bruce Armstrong, Michael Clarke (Respondents) (*Withdrawn*)

**3676-92-U:** Maria Correia (Applicant) v. Parker's Cleaning (Respondent) (*Dismissed*)

**3681-92-U:** Edward H. Lee (Applicant) v. C.F.C. Liquids Inks Div. (Respondent) (*Withdrawn*)

**3688-92-U:** Labourers' International Union of North America, Local 1089 (Applicant) v. 405730 Ontario Ltd. c.o.b. as Hiawatha Horse Park (Respondent) (*Withdrawn*)

**3700-92-U:** Daniel Parnetta (Applicant) v. Coats Patons, ACTWU, Local 836 (Respondents) (*Withdrawn*)

## APPLICATION FOR INTERIM ORDER

**3164-92-M:** International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Applicant) v. Metropolitan Toronto Apartment Building Association and Labourers' International Union of North America Local 183 (Respondents) v. Metropolitan Industrial & Commercial Masonry Contractors Inc., Masonry Contractors Association of Toronto Incorporated, (Interveners) (*Dismissed*)

**3239-92-M:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Price Club Canada Inc. (Respondent) (*Dismissed*)

**3438-92-M:** United Steelworkers of America (Applicant) v. Tate Andale Canada Inc. (Respondent) (*Granted*)

**3442-92-M:** Service Employees International Union, Local 204 (Applicant) v. Sanitary Maintenance Systems (Respondent) (*Granted*)

**3548-92-M:** United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. Tilden Car Rental (Respondent) (*Withdrawn*)

**3669-92-M:** Canadian Union of Public Employees, Local 1605 (Applicant) v. Mohawk Hospital Services Inc. (Respondent) (*Dismissed*)

**3689-92-M:** Labourers' International Union of North America, Local 1089 (Applicant) v. 405730 Ontario Ltd., c.o.b. as Hiawatha Horse Park (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**2895-92-M:** Olympia & York Developments Limited, Queen's Quay Terminal, Aetna Canada Centre (Employer) v. United Plant Guard Workers of America Local 1962 (Trade Union) (*Granted*)

**3590-92-M:** Ottawa Citizen (A division of Southam Inc.) (Employer) v. Ottawa Typographical Union, Local 102-CWA 14020 (Trade Union) (*Granted*)

## **TRUSTEESHIP**

**0499-92-T:** International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. International Association of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union No. 834, Toronto, Ontario (Respondent) (*Dismissed*)

## **JURISDICTIONAL DISPUTES**

**0013-90-JD:** Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 539 (Applicants) v. Vic West Steel, United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Dismissed*)

**2884-91-JD:** Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 537 (Applicant) v. Electrical Power Systems Construction Association, Bechtel Canada Inc., United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Local 18 (Respondents) (*Granted*)

**1916-92-JD:** Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1089 (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of its Local 663 and Curran Contractors Ltd. and Electrical Power Systems Construction Association and (Respondents) (*Withdrawn*)

**2225-92-JD:** International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Electrical Power Systems Construction Association, A.B.B. Combustion Services Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Respondents) (*Granted*)

**3093-92-JD:** General Contractors Section, Toronto Construction Association, Buttcon Limited, Clifford Masonry Limited (Applicants) v. United Brotherhood of Carpenters and Joiners of America, Local 27; Labourers' International Union of North America, Local 506 (Respondents) (*Granted*)

**3238-92-JD:** Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International

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**2596-92-M:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. Acadia Maintenance Company Inc. and Cambridge Leaseholds Limited (Respondents) (*Withdrawn*)

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**3107-92-OH:** Walter Socha (Applicant) v. Graham Bros. Construction Ltd. (Respondent) (*Withdrawn*)

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**3179-92-OH:** Muddathir Mohamed and Mahoud Hussein Abdelgadir (Applicants) v. Werstretch Creations Limited (Respondent) (*Withdrawn*)

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**2313-91-G:** Teamsters Local Union No. 879 (Applicant) v. Dufferin Construction Company (Respondent) (*Withdrawn*)

**2606-91-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Bonik Incorporated (Respondent) (*Terminated*)

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**3105-91-G:** International Brotherhood of Electrical Workers, Local 353 and The IBEW Electrical Power Systems Construction Council of Ontario (Applicant) v. M.B.B. Mechanical Services Limited and The Electrical Power Systems Construction Association (Respondents) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Intervener) (*Withdrawn*)

**0643-92-G:** United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Elite Construction Supplies (Respondent) (*Withdrawn*)

**0824-92-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. 765408 Ontario Inc. c.o.b. as D & D Masonry (Respondent) (*Granted*)

**0878-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. Arosan Enterprises Ltd. (Respondent) (*Withdrawn*)

**0907-92-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. IPCF Construction (Respondent) (*Granted*)

**1101-92-G:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Bradsil Limited (Respondent) (*Withdrawn*)

**1479-92-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of its Local Union 663 (Applicant) v. Curran Contractors Ltd., Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

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**2855-92-G:** Labourers' International Union of North America, Local 1059 (Applicant) v. Ecology Engineered Concrete Limited (Respondent) (*Granted*)

**2942-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. TS Acoustics Incorporated (Respondent) (*Withdrawn*)

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**3245-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Rose Mechanical Limited (Respondent) (*Withdrawn*)

**3274-92-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. I.P.C.F. Properties Ltd. (Respondent) (*Withdrawn*)

**3290-92-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 (Applicant) v. Lakehead Ironworks Inc. (Respondent) (*Granted*)

**3303-92-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bracknell Corporation, c.o.b. as The State Group (Respondent) (*Withdrawn*)

**3306-92-G:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Viva Painting Co. Ltd. and Grand Painting Ltd. (Respondents) (*Withdrawn*)

**3308-92-G:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Two Star Drywall Company Ltd. and Royalcrest Drywall & Construction Co. Ltd. (Respondents) (*Withdrawn*)

**3320-92-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Don Truax Sheet Metal Ltd. (Respondent) (*Granted*)

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**3354-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Michel Tremblay (Respondent) (*Withdrawn*)

**3358-92-G:** Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Select Masonry Limited (Respondent) (*Granted*)

**3361-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mollenhauer Contracting Co. Ltd. (Respondent) (*Withdrawn*)

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**3546-92-G:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Mississauga Cement Forming Ltd. (Respondent) (*Granted*)

**3573-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.S. Construction Co. (Respondent) (*Withdrawn*)

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**3578-92-G:** Labourers' International Union of North America, Local 183 (Applicant) v. E.G.M. Cape & Company Ltd. (Respondent) (*Withdrawn*)

**3581-92-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. J.G. Roger Electric (1981) Ltd. (Respondent) (*Granted*)

**3585-92-G:** Warren Cox Business agent Local 721 on behalf of the Iron Workers District Council of Ontario and the Trustees of the Iron Workers Pension and Welfare funds (Applicant) v. Mediro Wrought Iron Ltd. (Respondent) (*Granted*)

**3598-92-G; 3599-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Norcon Industries Inc. (Respondent) (*Withdrawn*)

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**May 1993**



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A Monthly Series of Decisions from the  
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HEMLO GOLD MINES INC., USWA AND; RE LAROY MACKENZIE AND WAYNE MACKENZIE ET AL. ALSO KNOWN AS EMPLOYEES OF HEMLO GOLD MINES INC. FOR A DEMOCRATIC CHOICE ..... 471

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Construction Industry - Construction Industry Grievance - Damages - Remedies - Employer found in violation of collective agreement in failing to observe mark-up process in assigning disputed work - Union claiming loss of opportunity damages, but not proving that it had members available to do the work - Board declaring violation of agreement but making no damages award

BECHTEL CANADA INC., EPSCA AND; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 537 .....

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INPLANT CONTRACTORS INC. AND 911846 ONTARIO LIMITED C.O.B. AS FLINT INDUSTRIAL SERVICES AND FLINT RIGGERS AND ERECTORS INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 1244.....

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Construction Industry - Related Employer - Voluntary Recognition - Board rejecting submission that making related employer declaration would extend, rather than preserve bargaining rights and that voluntary recognition agreement in this case was for a fixed term which ended in April 1992 -Employer cannot enter into collective bargaining relationship on trial or purely time-limited basis - Rule of *contra proferentem* not applying in this case - Board satisfied that no untoward delay by applicants in bringing application and that responding parties not prejudiced by delay - Application granted

WOODSTOCK ROOFING AND SHEET METAL, GREAT NORTH INDUSTRIES INC. AND GNI CONSTRUCTION LTD., #515422 ONTARIO LIMITED, C.O.B. AS; RE ONTARIO SHEET METAL WORKERS’ & ROOFERS’ CONFERENCE AND SMW, LOCAL 539 ..... 459

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Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Applicant alleging that union’s failure to take his discharge grievance to arbitration violating the *Act* - At conclusion of applicant’s case, Board entertaining union’s motion for non-suit without requiring it to elect whether it wished to call evidence - Board satisfied that applicant had presented no basis, on his own evidence, upon which application could succeed - Application dismissed

KENNETH EDWARD HOMER; RE IBEW AND ITS LOCAL 636; RE ST. CATHARINES HYDRO-ELECTRIC COMMISSION ..... 433

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ONTARIO HYDRO, EPSCA, LIUNA, LOCAL 1059; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SMW, LOCAL 473 ..... 442

Membership Evidence - Certification - Charges - Board certifying union following waiver of hearing by parties - Employer subsequently making "non-sign" allegation - Registrar advising employer that, having investigated allegation, Board seeing no basis for proceeding further - Employer seeking reasons for Board's decision not to proceed - Board explaining its procedure with respect to "non-sign" or "doubtful signature" investigations and its requirement of *prima facie* case - Revealing basis for Board's conclusion regarding existence of *prima facie* case in any particular case would be inconsistent with confidentiality provisions of the *Act* regarding employee wishes concerning union representation

BILOW'S RACEWAY AUTO PARTS INC.; RE UFCW, LOCAL 175 ..... 397

Membership Evidence - Certification - Charges - Intimidation and Coercion - Practice and Procedure - Following making of union's certification application, employee alleging forgery on one of cards submitted with application - Union investigating and seeking to withdraw application - Union making subsequent certification application and requesting that Board transfer some of membership evidence filed in first application to subsequent application - Employer wishing membership evidence collected in first application to be declared of no value and seeking to have its allegations of intimidation heard - Employer also seeking bar on future certification applications - Board permitting first application to be withdrawn without imposing bar - Employer free to pursue allegations of intimidation in subsequent certification application

CIRCLET FOOD INC.; RE USWA ..... 406

Natural Justice - Certification - Charter of Rights and Freedoms - Constitutional Law - Judicial Review - Petition - Representation Vote - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employ-

ees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing - Divisional Court dismissing objecting employees' judicial review application

HEMLO GOLD MINES INC., USWA AND; RE LAROY MACKENZIE AND WAYNE MACKENZIE ET AL. ALSO KNOWN AS EMPLOYEES OF HEMLO GOLD MINES INC. FOR A DEMOCRATIC CHOICE.....

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Practice and Procedure - Adjournment - Employee Reference - Board cancelling oral hearing scheduled to receive representations with respect to Officer's Report - Parties directed to make written representations - Board to make appropriate determinations on basis of evidence recorded in Officer's Report and parties' representations

MARC MECHANICAL LIMITED; RE LOCAL 47 SMW.....

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Practice and Procedure - Certification - Charges - Intimidation and Coercion - Membership Evidence - Following making of union's certification application, employee alleging forgery on one of cards submitted with application - Union investigating and seeking to withdraw application - Union making subsequent certification application and requesting that Board transfer some of membership evidence filed in first application to subsequent application - Employer wishing membership evidence collected in first application to be declared of no value and seeking to have its allegations of intimidation heard - Employer also seeking bar on future certification applications - Board permitting first application to be withdrawn without imposing bar - Employer free to pursue allegations of intimidation in subsequent certification application

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Practice and Procedure - Construction Industry - Evidence - Jurisdictional Dispute - Reconsideration - Timeliness - Board making final order in jurisdictional dispute complaint following consultation with parties - Labourer's union requesting reconsideration and arguing that Board improperly refused to hear certain evidence, that there was no evidence to support certain findings, and that Board misinterpreted material before it - Board explaining its approach to requests for reconsideration given need for finality in its adjudication - Board also explaining new "consultation" procedure for resolving jurisdictional dispute com-

plaints - Board finding no reason to reconsider its disposition of the complaint - EPSCA's separate reconsideration request dismissed as untimely under Rule 85 and on its merits

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Practice and Procedure - Discharge - Duty of Fair Representation - Evidence - Unfair Labour Practice - Applicant alleging that union's failure to take his discharge grievance to arbitration violating the *Act* - At conclusion of applicant's case, Board entertaining union's motion for non-suit without requiring it to elect whether it wished to call evidence - Board satisfied that applicant had presented no basis, on his own evidence, upon which application could succeed - Application dismissed

KENNETH EDWARD HOMER; RE IBEW AND ITS LOCAL 636; RE ST. CATHARINES HYDRO-ELECTRIC COMMISSION ..... 433

Reconsideration - Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Timeliness - Board making final order in jurisdictional dispute complaint following consultation with parties - Labourer's union requesting reconsideration and arguing that Board improperly refused to hear certain evidence, that there was no evidence to support certain findings, and that Board misinterpreted material before it - Board explaining its approach to requests for reconsideration given need for finality in its adjudication - Board also explaining new "consultation" procedure for resolving jurisdictional dispute complaints - Board finding no reason to reconsider its disposition of the complaint - EPSCA's separate reconsideration request dismissed as untimely under Rule 85 and on its merits

ONTARIO HYDRO, EPSCA, LIUNA, LOCAL 1059; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SMW, LOCAL 473 ..... 442

Related Employer - Bargaining Unit - Certification - Separate but related plastics manufacturers operating plants in Pickering and in Whitby - Union applying for certification and proposing bargaining unit made up of all employees of first corporate respondent in Whitby - Employer submitting that related manufacturers should be treated as one employer, and that appropriate bargaining unit should include all employees in Regional Municipality of Durham - Board making related employer declaration - Board satisfied that fragmenting employer's highly integrated operation would likely cause serious labour relations problems - Regional Municipality unit found to be appropriate - Application dismissed

HORNCO PLASTICS INC. AND HORN PLASTICS LTD.; RE ACTWU ..... 411

Related Employer - Construction Industry - Sale of a Business - Board rejecting union's submission that certain individual constituting "key person" and that brief tenure of other individual, found to be "key person", constituting contribution of the business or part of the business of predecessor to alleged successor employer - Successor rights application dismissed - Board not satisfied that responding companies operating under common control or direction - Related employer application dismissed

INPLANT CONTRACTORS INC. AND 911846 ONTARIO LIMITED C.O.B. AS FLINT INDUSTRIAL SERVICES AND FLINT RIGGERS AND ERECTORS INC.; RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF AND ON BEHALF OF LOCAL 1244 ..... 421

Related Employer - Construction Industry - Voluntary Recognition - Board rejecting submission that making related employer declaration would extend, rather than preserve bargaining rights and that voluntary recognition agreement in this case was for a fixed term which ended in April 1992 - Employer cannot enter into collective bargaining relationship on trial or purely time-limited basis - Rule of *contra proferentem* not applying in this case - Board

satisfied that no untoward delay by applicants in bringing application and that responding parties not prejudiced by delay - Application granted

WOODSTOCK ROOFING AND SHEET METAL, GREAT NORTH INDUSTRIES INC. AND GNI CONSTRUCTION LTD., #515422 ONTARIO LIMITED, C.O.B. AS; RE ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE AND SMW, LOCAL 539.....

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Remedies - Construction Industry - Construction Industry Grievance - Sheet Metal union and Plumbers' union alleging employer failure to comply with "working agreement" binding employer to collective agreements in "residential sector" - Employer claiming that Sheet Metal collective agreement restricted to specialty contractors and that subcontracting clause in Sheet Metal and in Plumbers' collective agreements not applying to it as a general contractor - Employer also asserting that unions would not have been able to get work on construction site identified in grievance because of bid depository arrangement and that damages should be denied - Board finding collective agreements not restricted to "specialty contractors", that working agreement binding employer to the collective agreements, and that subcontracting clauses effective against employer - Board finding employer in violation of collective agreements

WEST YORK CONSTRUCTION 1984 LTD.; RE SMW, LOCAL 285 .....

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Remedies - Construction Industry - Construction Industry Grievance - Damages - Employer found in violation of collective agreement in failing to observe mark-up process in assigning disputed work - Union claiming loss of opportunity damages, but not proving that it had members available to do the work - Board declaring violation of agreement but making no damages award

BECHTEL CANADA INC., EPSCA AND; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE AND SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 537 .....

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Representation Vote - Certification - Charter of Rights and Freedoms - Constitutional Law - Judicial Review - Natural Justice - Petition - Group of objecting employees filing "petition" in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the *Act* and Rule 47 of the Board's Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees' objections in oral ruling - Objecting employees then seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the *Act* to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing - Divisional Court dismissing objecting employees' judicial review application

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Sale of a Business - Construction Industry - Related Employer - Board rejecting union's submission that certain individual constituting "key person" and that brief tenure of other individual, found to be "key person", constituting contribution of the business or part of the business of predecessor to alleged successor employer - Successor rights application dismissed -

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INPLANT CONTRACTORS INC. AND 911846 ONTARIO LIMITED C.O.B. AS  
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RE MILLWRIGHT DISTRICT COUNCIL OF ONTARIO ON ITS OWN BEHALF  
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Timeliness - Abandonment - Bargaining Rights - Certification - Construction Industry - Certification applications brought by Bricklayers' union and Labourers' union barred by collective agreement between City and CUPE - Board satisfied that CUPE collective agreement applying to groups of employees whom applicants seeking to represent - Board rejecting alternative argument that CUPE abandoned bargaining rights with respect to employees covered by certification applications - Applications dismissed

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Timeliness - Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Reconsideration - Board making final order in jurisdictional dispute complaint following consultation with parties -Labourer's union requesting reconsideration and arguing that Board improperly refused to hear certain evidence, that there was no evidence to support certain findings, and that Board misinterpreted material before it - Board explaining its approach to requests for reconsideration given need for finality in its adjudication - Board also explaining new "consultation" procedure for resolving jurisdictional dispute complaints - Board finding no reason to reconsider its disposition of the complaint - EPSCA's separate reconsideration request dismissed as untimely under Rule 85 and on its merits

ONTARIO HYDRO, EPSCA, LIUNA, LOCAL 1059; RE ONTARIO SHEET METAL  
WORKERS' AND ROOFERS' CONFERENCE, SMW, LOCAL 473..... 442

Unfair Labour Practice - Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Applicant alleging that union's failure to take his discharge grievance to arbitration violating the *Act* - At conclusion of applicant's case, Board entertaining union's motion for non-suit without requiring it to elect whether it wished to call evidence - Board satisfied that applicant had presented no basis, on his own evidence, upon which application could succeed - Application dismissed

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HYDRO-ELECTRIC COMMISSION ..... 433

Voluntary Recognition - Construction Industry - Related Employer - Board rejecting submission that making related employer declaration would extend, rather than preserve bargaining rights and that voluntary recognition agreement in this case was for a fixed term which ended in April 1992 -Employer cannot enter into collective bargaining relationship on trial or purely time-limited basis - Rule of *contra proferentem* not applying in this case - Board satisfied that no untoward delay by applicants in bringing application and that responding parties not prejudiced by delay - Application granted

WOODSTOCK ROOFING AND SHEET METAL, GREAT NORTH INDUSTRIES  
INC. AND GNI CONSTRUCTION LTD., #515422 ONTARIO LIMITED, C.O.B. AS;  
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**3292-92-R United Food & Commercial Workers International Union, Local 175, Applicant v. Bilow's Raceway Auto Parts Inc., Responding Party**

**Certification - Charges - Membership Evidence - Board certifying union following waiver of hearing by parties - Employer subsequently making "non-sign" allegation - Registrar advising employer that, having investigated allegation, Board seeing no basis for proceeding further - Employer seeking reasons for Board's decision not to proceed - Board explaining its procedure with respect to "non-sign" or "doubtful signature" investigations and its requirement of *prima facie* case - Revealing basis for Board's conclusion regarding existence of *prima facie* case in any particular case would be inconsistent with confidentiality provisions of the *Act* regarding employee wishes concerning union representation**

**BEFORE:** *Louisa M. Davie*, Vice-Chair, and Board Members *W. A. Correll* and *G. McMenemy*.

**DECISION OF THE BOARD;** May 6, 1993

1. By decision of the Board dated March 22nd, 1993 the applicant trade union ("UFCW" or "the union") was certified to represent certain employees of the respondent employer. That decision was issued after a hearing in this matter had been waived by the parties. During the course of the Board's usual waiver process the Board officer advised the parties of "the count" that is to say the number of employees in the agreed upon bargaining unit and the number of those employees on whose behalf the union had filed documentary evidence of membership. That count was subsequently confirmed in the Board officer's letter to the parties dated March 23rd, 1993.

2. By letter dated March 25th, 1993 the employer's representative wrote to the Registrar as follows:

Following receipt of notification from Ms. B. Wild on March 24, my client, Bilow's Raceway Auto Parts Inc., posted Appendix B on its notice board. After posting, the employer was approached by five employees who insisted that they did not sign membership cards. The five employees are: Tom Burnett, Marc Bennett, Derek Bennett, Barton Atkins, and Doug Day. I am writing to request that the Board conduct a very thorough investigation into the union's evidences of membership since we now believe that signatures for the above-named employees may be improper. This request is being submitted by me on behalf of the employer and each of the employees who have signed in a space provided below.

Thank you for your assistance in dealing with this matter.

The letter is signed by the employer's representative and four of the employees named in the letter.

3. As a result of these "non-sign" allegations the Board conducted its usual investigation. By letter from the Registrar dated April 14th, 1993 the Board advised the respondent employer that it had conducted its investigations into the allegations raised in the March 25th letter and that the Board saw no basis for proceeding further.

4. By letter dated April 20th, 1993 the employer's representative wrote as follows:

I have received your letter of April 14th and have concerns about the Board's response. The purpose of this letter is to request reasons for the Board's decision.

The allegations of fraud, raised in my letter of March 25, are very serious

and I believe that, as a matter of natural justice, the employer and the employees are entitled to know the reasons for the Board's decision not to proceed any further. I am also writing to request information concerning the nature of the Board's investigation into this matter. For example, did it contact all of the employees who claimed that they did not sign cards and determine conclusively whether or not they had done so?

I look forward to your early response in this matter.

5. In the circumstances, the Board considers it appropriate to provide these written reasons for its decision not to proceed.

6. Subsection 113(1) of the *Labour Relations Act* protects the identity of persons who are members of a union or desire to be represented by a union. It also protects the identity of persons who are not members of a trade union or who do not wish to be represented by a trade union. The statutory direction is to maintain the secrecy of the wishes of the employees with respect to union representation and the Board goes to significant lengths to protect the confidentiality of the employees' wishes in accordance with the wording and purpose of subsection 113(1). (See, for example, *Roytec Vinyl Company*, [1990] OLRB Rep. June 720 and the cases referred to therein).

7. Subsection 113(1) states as follows:

**113.-(1)** The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

8. The Board however must also be satisfied that an applicant trade union enjoys the support of the majority of the employees in the bargaining unit. The primary method of ascertaining that support is the level of union membership. Under the Act the Board must be satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the trade union on the application date or have applied to become members on or before that date. (See *Unlimited Textures Company*, [1984] OLRB Rep. Jan. 138). As membership evidence is the primary basis for its certification decisions, the Board has developed a number of safeguards in assessing membership evidence. Those safeguards are referred to in the Board's decision in *Roytec Vinyl*, *supra*, as follows:

39. In addition, there are a number of safeguards integrated into the processing and assessment of membership evidence by the Board. Every single membership card is painstakingly checked to insure that it complies with the Board's requirements for membership evidence. As well, the signature of each employee on each card is checked against a sample signature for that employee provided by the employer. This process is performed at least twice and sometimes more often on each application by Board clerks who are specially trained to this end. Any discrepancies noted by them are brought to the attention of the panel deciding the case. Not infrequently, the panel will utilize the Board officer screening process to further check on a so-called "doubtful" signature and, as described in the Board's jurisprudence, mem-

bership evidence is held to strict standards (see *Grand & Toy, supra*). While no process for assessing employee wishes or membership is absolutely fool-proof, generally speaking it is fair to say that this rigorous procedure has served the labour relations community well for many years. And as the Board noted in *Grand & Toy, supra*, errors in this process are extremely rare.

We note that in the present case, at the time the Board issued its written decision certifying the trade union, the signatures on the membership cards had already been checked against the specimen signatures.

9. In addition to these safeguards the Board also has its well-established procedure with respect to conducting non-sign or “doubtful” signature investigations. Where an allegation of non-sign is raised (as in this case) or where the Board itself has identified a “doubtful” signature the Board will investigate. Although the Board investigates allegations of non-sign whenever they are raised, the allegation will not be heard by a panel of the Board unless the Board is satisfied that there is a *prima facie* case that the evidence of membership was not signed by the employee whose signature purports to be on the evidence of membership.

10. The investigation is initially carried out by a Board officer. The involvement or intervention of the Board officer is a necessary step in the Board’s investigation of any non-sign or doubtful signature allegation in order to maintain the secrecy of the employee’s wishes with respect to union representation as set out in subsection 113(1) of the Act. It would be inconsistent with the statutory intent of subsection 113(1) of the Act if the Board were to conduct a hearing that would have the effect of disclosing the identity of persons and their wishes with respect to union representation merely because a non-sign allegation is made. Thus where a non-sign allegation is made the disclosure of the identity of the person alleged not to have signed and his/her wishes about union representation are protected to the extent possible until the officer’s inquiry and investigation indicates there is a *prima facie* case. Only where there is a *prima facie* case will an employee’s identity and wishes about union representation be revealed more extensively and a hearing conducted.

11. The Board officer’s inquiry and investigation may reveal that the union did not file membership evidence on behalf of the person alleged not to have signed any membership evidence. If that is the case the investigation is concluded and further action is generally unnecessary. If membership evidence *has* been filed on behalf of persons alleged not to have signed evidence of membership the Board officer makes inquiries of that person. It is on the basis of these types of investigation that the Board determines if there is a *prima facie* case.

12. If it is determined that there is not a *prima facie* case the matter will not proceed any further. It may be that there is no *prima facie* case because the union did not file membership evidence on behalf of the person alleged not to have signed or it may be because the person admitted to the Board officer that he or she incorrectly or mistakenly told someone that he or she did not sign a card. (In this latter case we note that the Board officer’s report is also signed by the employee, thus in effect providing the Board with yet another specimen signature for purposes of comparison).

13. Regardless of which of these reasons applies the Board’s practice is to merely advise the party raising the non-sign allegation that there is no basis for proceeding further. It would be inconsistent with the confidentiality provisions of the Act for the Board to reveal that the matter will not proceed further either because a card was not in fact submitted on behalf of a particular person alleged not to have signed a card or because a person has admitted that he/she in fact signed the card submitted by the trade union.

14. In this case each of these steps to ensure the veracity of the membership evidence was followed. The result of these various steps, inquiries and investigations have caused the Board to conclude that there is no basis for proceeding further.

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**2306-91-G Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers International Association, Local 537, Applicants v. Electrical Power Systems Construction Association and Bechtel Canada Inc., Responding Parties**

**Construction Industry - Construction Industry Grievance - Damages - Remedies - Employer found in violation of collective agreement in failing to observe mark-up process in assigning disputed work - Union claiming loss of opportunity damages, but not proving that it had members available to do the work - Board declaring violation of agreement but making no damages award**

**BEFORE:** *S. Liang*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

**APPEARANCES:** *S. B. D. Wahl* and *N. Agnew* for the Sheet Metal Workers International Association, Local 537; *M. Patrick Moran*, *Marna Shecter*, *G. Brooks* and *L. Tasker* for Electrical Power Systems Construction Association and Bechtel Canada Inc.

**DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER W. N. FRASER:** May 28, 1993

1. This is a referral of a grievance pertaining to the construction industry, pursuant to section 126 of the *Labour Relations Act*.

2. As set out in the decision of the Board dated November 13, 1991, the grievance has two parts. The applicant, the Sheet Metal Workers' International Association, Local 537 ("Local 537" or "the union") asserts that the responding parties are in violation of the agreement by using members of another union to perform certain work that had already been assigned to Local 537 in a mark-up meeting in the fall of 1990. In the alternative, Local 537 asserts that a meeting held by Bechtel Canada Inc. ("Bechtel") in September of 1991 was not a proper mark-up meeting, in breach of the collective agreement.

3. In the previous decision, the Board adjourned the hearing of this grievance pending the filing of a jurisdictional dispute. This was done, and after consulting with the parties on February 24, 1993, the Board ruled that the work in dispute should have been assigned to members of the Sheet Metal Workers International Association.

4. In the hearing of this grievance, the Board heard evidence from Norm Agnew and Owen Pettipas for the applicant, and Grant Brooks for the responding parties. We also received certain documents on agreement of the parties, which we have reviewed. Much of the evidence is not disputed. It is not in dispute that the parties are bound to a collective agreement effective May 1, 1990 to April 30, 2000.

5. On September 11, 1990, Bechtel and The Electrical Power Systems Construction Association ("EPSA") held a pre-job conference with a number of trades, including Local 537. The

purpose of this meeting was to outline to the representatives of the trades an upcoming project to be undertaken by Bechtel. Those present at the meeting were given a package of materials which described the work and also outlined proposed work assignments. The project involved the replacement of a wet fly ash handling system at Nanticoke Thermal Generating Station with four new dry ash handling systems. As outlined in the materials relating to the pre-job conference and mark-up, some of the work on the project was performed by Bechtel, and some was sub-contracted. The purpose of this mark-up was the assignment of the work which Bechtel was to perform.

6. Among the work which Bechtel proposed to assign was the installation of “insulated panels” found under the heading “Metal buildings”. Bechtel’s proposed assignment of this work was to a composite crew of Ironworkers and Sheet Metal Workers. The minutes of the meeting of September 11, 1990 show that there were no disputes with respect to this proposed assignment. Subsequently, on October 17, Bechtel notified the trades of the final work assignments. Insulated panels were assigned to a composite crew of Ironworkers and Sheet Metal.

7. On the evidence, it appears that at the time of the October 1990 work assignment, Bechtel did not have specific plans for a metal building using insulated panels. Grant Brooks, Labour Relations supervisor for Bechtel, stated that Bechtel’s practice is to conduct “generic” mark-ups which include all work which the company anticipates might be performed on a project, but which might not actually be performed. At the time of this mark-up, Bechtel anticipated that it might erect a “Butler” type of building, which is a pre-engineered or foldaway metal building. For this type of building, Bechtel relied on a trade agreement between the Ironworkers and Sheet Metal Workers in making its assignment. As it happens, Bechtel did not erect any pre-engineered or foldaway metal buildings.

8. However, starting in September of 1991, Bechtel did install four indoor modular offices, which became the subject of this grievance and the jurisdictional dispute. These buildings were installed using members of the United Brotherhood of Carpenters and Joiners of America, Local 18. The walls of these buildings were made of wall panels consisting of an outer and inner skin of metal with insulation between the two skins. When work began on these buildings, Local 537 complained to Bechtel, stating that these were “insulated panels” that had been assigned to its members in the October 1990 work assignment.

9. There is no dispute that by the time the complaint was made, work had already started on the modular offices. Bechtel ordered a halt to the work and arranged for a meeting with representatives of Local 537 and Local 18. As a result of this meeting, Bechtel requested both trades to submit evidence of their claim to work jurisdiction over the work in dispute. The trades were given 24 hours to do so. Bechtel subsequently, by letter dated September 25, assigned the installation of the wall panels to Local 18. Other work, the installation of metal roof decking and flashing, was assigned to Local 537.

10. Counsel for the applicants urges the Board to find that the work in dispute was assigned to Local 537 in the October 1990 work assignment. Although not referring the Board to a specific article of the collective agreement regarding a change in assignment, counsel submitted that the performance of the work by Local 18 violated the agreement where such work had been previously assigned in a proper mark-up process. In the alternative, if the work had not been previously assigned, it should have been the subject of a mark-up meeting held in accordance with the requirements of the collective agreement. The events of September 1991 did not comply with the provisions of the collective agreement regarding mark-up meetings.

11. Counsel for the applicant submits that the appropriate award under either alternative

position taken under the grievance is the value of the lost opportunity to the applicant. This value is measured having regard to the amount of wages and benefits which would have been paid to members of Local 537. Evidence was called by the applicant as to the number of hours required to install the wall panels in the four modular offices.

12. Counsel for the responding parties submits, among other things, that the applicant has failed to prove its case. It has not called any evidence to establish that there were members of Local 537 who were ready, willing and able to do the work in question and has thus failed to establish that any loss was suffered as result of the alleged violation. Counsel relies on *Piggott Construction Limited*, [1987] OLRB Rep. Apr. 599; *Piggott Construction Limited*, [1985] OLRB Rep. Aug. 1290; *Blouin Drywall Contractors Ltd.*, (1975) 57 D.L.R. (3d) 199, and *Schindler Elevator Corporation*, [1990] OLRB Rep. Oct. 1092.

13. In any event, counsel denies that there has been any violation of this collective agreement. Bechtel does not dispute that it was obliged to hold a mark-up with respect to this work. It takes the position that the meeting of September 1991 and opportunity to submit representations on the work assignment constituted a mark-up under the collective agreement. This work had not previously been assigned. When it became apparent that the work was to be performed and that there was a dispute over the appropriate work assignment, Bechtel gave the two trades the chance to claim the work and submit representations. If the purpose of the mark-up provisions in the collective agreement is that contractors provide the opportunity for trades to claim work, this was achieved by the actions taken by Bechtel in September 1991.

14. Article 8 of the collective agreement states:

#### Article 8

#### WORK-ASSIGNMENT

- 8.1 The jurisdiction of the Union shall be that jurisdiction established by agreements between International Unions claiming the work or decisions of record recognized by the AFL-CIO for the various classifications and the character of work performed, having regard for the special requirements of thermal, nuclear or hydraulic generation and transmission and transformation construction.

An Agreement or Decision of Record is one that is published by the Building and Construction Trades Department AFL-CIO (Agreement and Decisions Rendered Affecting the Building Industry).

Where no Decision or Agreement applies, the Employer agrees to consider evidence of established practices of other Employers within the construction industry when making jurisdictional assignments.

- 8.2 Regular mark-up meetings will be conducted for each project and for transmission and transformation construction at times appropriate for the work in progress. The purpose of these mark-up meetings is to indicate to the Unions the work which is about to be carried out by the Employer in order to minimize the potential for jurisdictional disputes.

EPSCA will provide written notice to the Union as far in advance as possible of mark-up meetings.

The Union will attend these mark-up meetings, and every effort will be made to settle questions of jurisdictional before the dates that management indicates the work is expected to commence.

- 8.3 The Employer who has the responsibility for the installation shall make a proposed

assignment of the work involved. The Employer will specify a time limit for the Unions involved to submit evidence of their claims. The Employer will evaluate all evidence submitted as per Article 8.1 and make a final assignment of the work involved. The Employer will advise the Union of the final assignment prior to work commencing. A copy of such assignments shall be submitted to the Business Manager of the Ontario Sheet Metal Workers' Conference.

- 8.4 When a jurisdictional dispute exists between unions, and upon request by the Union, the Employer shall furnish the Business Manager of the Ontario Sheet Metal Workers' Conference with a signed letter from a duly authorized official of the company on Employer stationery, stating whether or not the Union was employed on specific types of work on a given project. The Employer shall supply the Business Manager of the Ontario Sheet Metal Workers' Conference with a copy of the evidence submitted by the other union(s) involved along with drawings and/or prints plus a description of the work or process in dispute when requested.
- 8.5 In the event that a jurisdictional dispute cannot be settled on a local basis by the Unions involved, it shall be submitted to the Unions involved for settlement without permitting it to interfere in any way with the progress of the work at any time. In the event the dispute is not settled by the Unions involved, EPSCA and/or the Union may then submit the dispute to the Ontario Labour Relations Board under the *Labour Relations Act*. EPSCA and the Ontario Sheet Metal Workers' Conference will advise [sic] each other in writing of their intent to submit a jurisdictional dispute to the Ontario Labour Relations Board and will identify in detail the work in question. The decision of the Ontario Labour Relations Board with respect to the jurisdictional dispute will be final and binding on the parties to this Agreement. The Ontario Labour Relations Board will determine the jurisdictional dispute before it pursuant to its normal criteria.
- 8.6 In the event the Union pursues or responds to a jurisdictional dispute at the Ontario Labour Relations Board the hearings panel appointed by the Ontario Labour Relations Board pursuant to the Act is not authorized to award damages in respect of a misassignment of work, only in circumstances where the other union(s) involved in the proceedings is (are) equally restricted in their ability to claim for damages. However, this paragraph 8.6 shall not apply where the jurisdictional dispute and the misassignment of work involves the same employer and the same work previously the subject matter of a jurisdictional dispute, relating to a construction project covered by this Agreement or its predecessors, before the Ontario Labour Relations Board.
- 8.7 In the event the building trades in the Province of Ontario are successful in establishing a Provincial Impartial Jurisdictional Disputes Board, EPSCA and the Union agree to meet and discuss implementation of procedures set forth by said Board.

15. We are satisfied that Bechtel violated the collective agreement. We agree with counsel for Bechtel that work in question was not assigned in October of 1990. It is apparent that at that time, no party anticipated the use by Bechtel of modular office buildings. We are satisfied that the wall panels of the modular office buildings that were installed in 1991 were different from the kind of insulated panels used in metal buildings which were the subject of the 1990 mark-up. The work assignment of October 1990 assigned "insulated panels" in metal buildings to a composite crew of Ironworkers and Sheet Metal Workers. Local 537 did not dispute this assignment and claim the entirety of the work for its trade. Neither did the Carpenters make a claim for this work. Further, when the issue arose over the modular office buildings in 1991, the Ironworkers did not make a claim that the wall panels should be installed using a composite crew including members of its trade. All of this is consistent with the conclusion that the intention of the 1990 work assignment was to deal with foldaway or pre-engineered metal buildings, and not with wall panels forming part of modular office buildings.

16. That, however, is not the end of the story. If the work had not previously been

assigned, then Bechtel had an obligation under Article 8 to assign the work after a mark-up process. The provisions of Article 8 anticipate that more than one mark-up meeting may be held over the duration of a project. Article 8.2 refers to “mark-up *meetings*” [emphasis added], to be held “at times appropriate for the work in progress”. This takes into account the reality that over the course of a project, work may arise which has not been previously marked up, and for which a mark-up meeting is required. Bechtel does not dispute that it was obliged to assign the work in question in a mark-up process, but maintains that the events of September 1991 were sufficient compliance with the requirements of the collective agreement with respect to such a process.

17. With respect, we find that this is not so. In several ways, the events of September 1991 did not comply with the requirements of the collective agreement respecting such a process. Most importantly, none of the procedural steps which are required to be taken *before* the work commenced were actually, if at all, taken until *after* the work commenced. Bechtel gave *no* notice of this upcoming work to the interested unions, in writing or otherwise. No proposed assignment was made. The final assignment was made only after the work had commenced.

18. Article 8 is very clear as to the purpose of its provisions. It is to “minimize the potential for jurisdictional dispute” by making “every effort...to settle questions of jurisdiction before the dates that management indicates the work is expected to commence.” In the case before us, this purpose was thwarted when Bechtel commenced work on the modular office buildings before any discussion with the interested trades as to the appropriate work assignment. Counsel for the respondent states that many of the requirements in Article 8 are “technical” and that Bechtel did comply substantively with its purpose by having the meeting of September 23 and giving each trade the opportunity to make representations. We do not agree that the failure to comply with Article 8 *in the case before us* was merely technical in nature. It is apparent that it is a significant ingredient of the scheme in Article 8 that potential disputes be dealt with *before* they become disputes, and that work assignment issues have a chance to be resolved before they result in the disruption of work. Bechtel made *no* attempt to comply with Article 8 before the dispute arose.

19. We therefore find that Bechtel violated the collective agreement when it failed to follow the provisions of Article 8 in the assignment of the work in dispute.

20. In the case before us, the applicant asserts that the loss suffered as a result of this violation was the loss of an opportunity. No other theory of damages was advanced. In essence, the applicant asserts that it was denied the chance to make a meaningful claim to the work in dispute in a properly established mark-up process. Had it been accorded the chance to make a meaningful claim, it would have received the opportunity to have its members perform the work. As a result of the violation of the agreement, it was denied this opportunity. In the submission of the applicant, the measure of its lost opportunity is the wages and benefits for the number of hours required to complete the work. The applicant called evidence as to the number of hours it asserts would be required, as did the responding parties. However, the applicant asserts that it need not prove *actual* loss to its members by proving that it had tradesmen as of September 1991 who were available to do the work. Relying on *Ontario Hydro*, [1988] OLRB Rep. Dec. 1303, counsel states that it is not necessary for the applicant to prove actual damages in a loss of opportunity case resulting from the failure to hold a proper mark-up meeting.

21. Counsel, in our view, is merging two related concepts. Assuming that the appropriate theory of damages in this case is lost opportunity, the applicant has to establish, on a balance of probabilities, that it would have received an opportunity but for the violation *and* that its members suffered a loss by not having received the opportunity. We agree that it is not necessary for an applicant, in order to be entitled to damages, to establish with 100% certainty that its members

would have been assigned the work in question but for the violation of the agreement. However, assuming that the applicant can establish that it would have received the work assignment (or opportunity) but for the violation, it still has to establish that it or its members suffered a loss by not receiving the opportunity. Where there is no evidence that the applicant had members who could have availed themselves of the offer of work, there is no evidence that the applicant or its members have suffered a loss by not receiving the opportunity.

22. On the theory of damages advanced by the applicant, we cannot see a distinction between this case, and *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199. In *Re Blouin Drywall*, the Ontario Court of Appeal upheld an award of damages arising out of an employer's use of non-union employees, stating:

"Having found that the employer was in breach of the agreement, the amount of wages lost, and that there were union members available to do the work, the Board had jurisdiction to make the order in question."

23. *Re Blouin Drywall*, did not involve the failure to observe mark-up requirements in a collective agreement but the loss asserted, i.e. wages and benefits to union members, is the same as that asserted before us. The burden of evidence arising out of *Re Blouin Drywall* is not a difficult one for a union to meet. In fact, prior to *Re Blouin Drywall*, the law required a union to name each member that suffered the loss asserted. We note that in *Ontario Hydro, supra* (and in the subsequent unreported decision of April 17, 1989), which was a "mark-up" case, where the Board did not specifically refer to having received evidence of unemployed tradesman, the issue does not appear to have been raised.

24. We therefore conclude that although there is a violation of the collective agreement, and we so declare, we have no evidence of loss on which we can base an award of damages.

25. Because of our findings, we do not need to deal with other arguments advanced by Bechtel, including the assertion that Article 8.6 of the agreement precludes an award of damages in any event.

#### **DECISION OF BOARD MEMBER J. REDSHAW; May 28, 1993**

1. I cannot agree with the majority in the position they take regarding damages. To do so would be agreeing that the employer can violate the agreement with impunity.

2. Counsel for the employer submits that the union did not prove that it had members ready willing and able to do the work. The union should not be required to prove the obvious.

3. For the last several years the union halls of Ontario have been saturated with unemployed capable members as anyone familiar with construction would know. It should be unnecessary to prove the list. This grievance is about the last opportunity of the union to supply direct hire employees to the employer and not a subcontracting grievance as in the *Pigott* line of cases.

4. The union was never afforded the opportunity to supply its members to the employer and I would have awarded damages.

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**0083-93-R United Steelworkers of America, Applicant v. Circlet Food Inc., Responding Party**

**Certification - Charges - Intimidation and Coercion - Membership Evidence - Practice and Procedure - Following making of union's certification application, employee alleging forgery on one of cards submitted with application - Union investigating and seeking to withdraw application - Union making subsequent certification application and requesting that Board transfer some of membership evidence filed in first application to subsequent application - Employer wishing membership evidence collected in first application to be declared of no value and seeking to have its allegations of intimidation heard - Employer also seeking bar on future certification applications - Board permitting first application to be withdrawn without imposing bar - Employer free to pursue allegations of intimidation in subsequent certification application**

**BEFORE:** *K. G. O'Neil*, Vice-Chair, and Board Members *G. O. Shamanski* and *C. McDonald*.

**APPEARANCES:** *R. Healey* and *B. Paris* for the applicant; *T. English* and *Allan Greenspoon* for the responding party.

**DECISION OF THE BOARD;** May 14, 1993

1. This is an application for certification, which the applicant seeks to withdraw. The respondent says it should be dismissed with a six month bar on further applications. In furtherance of this the employer wishes us to hear evidence of allegations of intimidation.

2. This application was filed on April 8, 1993. By letter to the union dated April 30, 1993, an employee made an allegation of forgery on one of the cards submitted. The union investigated and by letter to the Board dated April 27 sought to withdraw its application. The meeting with the Labour Relations officer had been set for May 5 and the hearing of this matter for May 10, 1993.

3. A second application for certification has been filed and the union has requested the Board transfer some of the membership evidence filed in support of this application to the second application. The employer wishes the membership evidence collected in the first application to be declared of no value and for the Board to prevent its being transferred to the second application on the basis of the fact of fraudulent membership evidence and its allegations in intimidation.

4. The employer argued in the alternative that if the Board was not willing to accept the evidence of its allegations of intimidation, that the union's admission that a signature that had been submitted was fraudulent is enough to taint all of the membership evidence collected for this application and have it not be accepted at all.

5. Employer counsel referred to *Dominion Stores Limited*, [1964] OLRB Rep. Dec. 447, *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181, *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37 and *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424 in support of its submissions.

6. The union says that these matters should be dealt with in the context of the second application and that there is nothing to prevent it from withdrawing in the circumstances of this case. It sought to withdraw a week before the Labour Relations Officer's meeting was scheduled and almost two weeks before the hearing date. The union argued that the applicable principles were those set out in the former Practice Note #7 which indicates that if a request for leave to withdraw is made in sufficient time before a hearing or before the Labour Relations Officer's

meeting the applicant has been permitted to withdraw. Counsel argues that there has been no representation vote or other event which would trigger a dismissal in this case. The union argues that the allegations of intimidation now go to membership evidence relevant to the second file and not to the first application. The card which had a bad signature has not been transferred to the new file. Counsel also relied on the case of *Westgate Nursing Home Inc.*, [1981] OLRB Rep. Apr. 503 where reference was made to the Board's practice of transferring cards from one file to another.

7. The union also argues that the allegations of intimidation were insufficiently pleaded as there were no dates, indication of location or circumstances pursuant to Rule 16 of the Board's Rules of Procedure. Counsel argues that the dates were of particular importance since when the alleged statements were made, i.e., before or after the organizing campaign, would be crucial. Counsel maintained that the union was not in a position to call evidence because of its lack of information on these allegations. He said that if he were required to proceed that he would bring a motion to dismiss because the pleadings in their current state do not make out a *prima facie* case. Union counsel also asked for an order directing particulars of the allegations on which the respondent intends to rely in the second application.

8. After recessing to consider the submissions of the parties the Board ruled orally that it would not hear evidence of the allegations of intimidation in the context of this application, as follows:

The issue of taint from any intimidation allegations which are made out on the membership evidence in the second application is more properly dealt with in the context of the whole ensemble of the membership evidence within that application. It is not necessary to determine the merits of the allegations of intimidation in order to determine whether or not the applicant should be allowed to withdraw this application. Nor do we think it a wise use of anyone's resources to litigate the matter in the context of this application.

The particulars are also not sufficient to require the union to litigate these allegations today and this is an additional reason to defer this issue to the second application.

9. The Board reserved on the issue of whether the applicant should be allowed to withdraw. Having further considered the submissions of the parties we are of the view that the applicant should be allowed to withdraw this application. There is nothing in the new Rules or in the Bill 40 amendments to the Act that changes the considerations underlying the Board's previous practice as set out in former Practice Note 7. Given the stage of the proceedings at which the applicant sought to withdraw, it should be permitted to do so.

10. We have carefully considered the authorities filed by the respondent. They all pertain to situations where the applicant did not seek to withdraw but where, after litigation of an issue, the Board found against the applicant. That is a situation quite distinguishable from this case where the union investigated and sought to withdraw the application well before the Officer's meeting or hearing.

11. On the question of a bar to further applications, see also *Leco Industries Limited*, [1979] OLRB Rep. May 404 at para. 7 where it is observed that the Board will not generally impose a bar where leave to withdraw has been requested upon the discovery of defective membership evidence. It further observes that even where allegations of defective membership evidence have been substantiated the greatest effect would normally be a dismissal of the application rather than a bar.

12. In the result leave is granted to withdraw this application.

13. The respondent may pursue its allegations of intimidation in the subsequent application. Its attention is drawn to its obligation under Rule 16 which provides as follows:

16. Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

14. As an administrative matter the membership evidence that the union has asked to be transferred to the second file will be transferred. All issues concerning the use of that evidence may be raised with the panel hearing the second application.

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**1364-92-R; 1444-92-R** International Union of Bricklayers and Allied Craftsmen, Local 5, Applicant v. **Corporation of the City of St. Thomas**, Responding Party v. Canadian Union of Public Employees, Intervenor; Labourers' International Union of North America Local 1059, Applicant v. Corporation of the City of St. Thomas, Responding Party v. Canadian Union of Public Employees, Intervenor

**Abandonment - Bargaining Rights - Certification - Construction Industry - Timeliness - Certification applications brought by Bricklayers' union and Labourers' union barred by collective agreement between City and CUPE - Board satisfied that CUPE collective agreement applying to groups of employees whom applicants seeking to represent - Board rejecting alternative argument that CUPE abandoned bargaining rights with respect to employees covered by certification applications - Applications dismissed**

**BEFORE:** *S. Liang*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Kurchak*.

**APPEARANCES:** *L. A. Richmond* and *J. Haggis* for the applicant; *Ray Werry* for the responding party and *Dave Foley* for the intervenor.

**DECISION OF THE BOARD;** May 26, 1993

1. These are applications for certification filed by the International Union of Bricklayers and Allied Craftsmen, Local 5 ("the Bricklayers") and the Labourers' International Union of North America ("the Labourers") with respect to employees of the Corporation of the City of St. Thomas ("the City"). The two applications were listed for hearing together, and the parties agreed to have them consolidated for the purpose of determining the preliminary issue, which is common to both. The preliminary issue which was heard by this panel is the timeliness of these applications. The City and the intervenor the Canadian Union of Public Employees ("CUPE") take the position that the applications are barred since there is a collective agreement between the City and CUPE, Local 35 which covers the bargaining units sought by the applicants. The applicants take the position that there is no overlap between the applications and the bargaining unit covered by the CUPE agreement or in the alternative, that CUPE has abandoned its bargaining rights with respect to the employees covered by these applications.

2. The applicants seek bargaining rights for their standard crafts units under section 146(1) of the *Labour Relations Act*. These applications were filed on August 5 and 7, 1992. The current

collective agreement between CUPE, Local 35 and the City was entered into on June 26, 1992, to be effective from January 1, 1992 until December 31, 1993. Accepting the position of the City and CUPE, these applications have been brought outside the time period specified under section 5(4) of the Act.

3. The Board heard the evidence and representations of the parties. At the conclusion of the hearing, on May 5, 1993, the Board ruled orally that these applications are barred by the collective agreement between the City and CUPE, Local 35 and dismissed the applications. The Board ruled that it was satisfied that the CUPE collective agreement covers the bargaining units sought by the applicants, and that there has been no abandonment of the bargaining rights with respect to these units. We now provide our reasons for that ruling.

4. Over the course of the hearing, the Board heard evidence from various representatives of the City, as well as from David Foley on behalf of CUPE. The Board also received documents from the parties such as collective agreements, photographs and correspondence. The evidence demonstrates that over the course of many years, the City has undertaken various construction projects, using members of its own workforce. The projects to which the witnesses testified took place under the auspices of the City's Public Works Department and Parks and Recreation Department. Employees of the City in the Public Works Department have done work on roads, curbs, gutters, sidewalks, drainage systems, erosion control systems, storm sewers and other outdoor projects. This work includes excavation, forming, pouring concrete, asphalt work, and various other construction tasks. The City also contracts out work to construction companies. Much of the work performed by the City may be characterized as maintenance, but we are satisfied that a significant portion is work in the construction industry.

5. Most of the City's employees performing this work are classified as "Medium Equipment Operator". The Department also hires seasonal employees classified as "Student Labourer" or "Casual Labourer". There is no classification of "Construction Labourer", which is the construction trade for which the Labourers seek bargaining rights. However, we are satisfied that the work of construction labourers has been performed by members of the City's workforce involved in the above projects.

6. Part of the responsibilities of the City's Parks and Recreation Department is the construction, improvement and maintenance of facilities such as sports arenas, concession buildings and park pavilions. The City has used members of its own workforce over the years in projects involving the renovation of these facilities. The City has also contracted some of this work to construction companies. Sometimes, employees of contractors and employees of the City are involved in the same project. There is no classification of "Bricklayer" in the CUPE collective agreement, but employees of the City have done bricklaying and blocklaying as part of these projects. This work appears to be seasonal in nature and the employees involved in it are generally classified as "Casual Labourer". The City has also contracted for bricklaying work through a sub-contractor.

7. In the fall of 1991, the City sought funding under a provincial government program and a federal government program to hire additional employees in 1992. The funding would permit the City to hire persons who otherwise would be receiving welfare or unemployment insurance benefits. These employees would be engaged in various projects in the City's parks system, including the construction of a building at Athletic Park. The City informed CUPE of its intent to enter into these programs. CUPE agreed to waive dues deductions for the employees for the duration of the program. The evidence was that the work performed by these employees would not have been done by the City in the absence of special funding permitting it to hire the additional staff. The

work, however, is not dissimilar from work which the City has performed in the past with its own forces.

8. Employees hired under the federal program were paid directly by Employment and Immigration Canada, and those under the provincial program, by the City. The wages under the federal program were those established by Employment and Immigration Canada, with the exception of two “blocklayers” to whom the City, with the concurrence of CUPE, agreed to pay an additional \$5.00 per hour over the program wages. The wages under the provincial program were those established under the collective agreement for casual labourers.

9. The applicants submit that CUPE has never represented labourers or bricklayers. Counsel for the applicants states that although there may be an overlap of *work* between the CUPE bargaining unit and the bargaining units sought by the applicants, such an overlap does not affect these applications. In essence, he argues that the performance of construction work by members of the CUPE bargaining unit should not be equated with bargaining rights for construction trades. Counsel submits that it is clear from the terms of the collective agreement that it was not meant to apply to construction trades. Although the recognition clause states that it covers “all employees”, the provisions do not reflect any of the standard terms which are found in construction industry collective agreements.

10. In the alternative, the applicants submit that if CUPE has ever represented labourers or bricklayers, they have abandoned their bargaining rights with respect to these employees. The evidence with respect to the job creation programs shows that CUPE had no wish to represent the employees hired under the programs. The applicants rely on the following cases: *Metro Railing Ltd.*, [1986] OLRB Rep. Dec. 1731; *Leeds and Grenville County Board of Education*, [1993] OLRB Rep. Feb. 141; *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305; *Ben Bruinsma and Sons Limited*, [1984] OLRB Rep. Mar. 404; *E K T Industries Inc.*, [1987] OLRB Rep. Mar. 352; *Ecodyne Limited*, [1979] OLRB Rep. July 629; *Metrus Contracting Limited*, [1979] OLRB Rep. Oct. 1009; *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914; *Hashman Construction Limited*, [1973] OLRB Rep. Apr. 205; *York-Finch General Hospital*, [1987] OLRB Rep. Apr. 641; *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110; *President Motor Hotel*, [1985] OLRB Rep. Sept. 1414; *Montreal House*, [1989] OLRB Rep. Jan. 29; *Ted Stothers*, [1990] OLRB Rep. Mar. 347; *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62; *The Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145; *Harm Schilthuis and Sons Limited*, Board File No. 2428-83-R, dated January 31, 1985 unreported and *Emery Industries (Canada) Ltd.*, (1970) 21 L.A.C. 163.

11. The Board is satisfied that the collective agreement applies to the groups of employees whom the applicants seek to represent. The recognition clause covers all employees of the City in its “outside” departments. The only specific exclusions are foremen and those above the rank of foremen, and employees covered under the agreement of Local 841 (which is the CUPE “inside” local). The wording of the recognition clause is not always determinative of the issue, but in this case, the evidence is consistent with the terms of the agreement in establishing that it was meant to apply to all outside workers, including those engaged in construction work. Crossing guards, who are arguably “outside” workers, are apparently covered by a part-time collective agreement with Local 841, but are in any event employed by the engineering section of the City’s operations, and not by the departments listed in the Local 35 agreement. We do not view this as significant in determining the intent of the Local 35 agreement.

12. It is also not significant to us that there are no specific wages in the agreement for bricklayers or construction labourers. Until 1992, the City relied on employees with a variety of skills to

perform its construction work, rather than employees who were highly specialized. The lack of classifications for specific construction trades does not lead to the conclusion that in the event the City decided to create such classifications, CUPE would not be entitled to represent these employees. In fact, in 1992, the City decided to hire two bricklayers as part of the job creation programs. We are satisfied that the City looked to CUPE to consent to the special arrangements and that CUPE agreed. The evidence of these discussions is consistent with an understanding that CUPE represents all outside workers hired by the City. It does not support the conclusion that CUPE has bargaining rights for employees with general skills who sometimes work in construction, but not for employees hired for specialized construction skills, if the City hired them. It also does not support the conclusion that CUPE intended to abandon bargaining rights for bricklayers, labourers, casual labourers, or construction employees hired under job creation programs.

13. Our findings are consistent with those in the cases submitted by counsel for the applicants. For instance, *Runnymede Development Corporation Limited*, *supra*, involved bargaining units described in terms of specific construction trades. There, the Board found that the “mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade.” That case did not involve a collective agreement which on its face applies to “all employees”. The present case is also distinguishable from *E K T Industries Inc.*, *supra*, in which the Board found that despite an “all employee” recognition clause, the union in question represented and only claimed to represent construction labourers.

14. Our present case is also different from the two cases referred to by counsel for the applicants relating to municipalities and construction trade unions, *The Municipality of Metropolitan Toronto*, *supra*, and *The Corporation of the City of Toronto*, *supra*. In the former, the applicant union had for many years supplied temporary carpenters from its hiring hall to the employer, and the intervener union had never sought to represent these temporary carpenters. In the latter case as well, the intervener union did not claim to represent any of the persons affected by the application.

15. For the reasons above, the Board found these applications to be untimely, and dismissed the applications at the hearing.

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### **3763-92-R Amalgamated Clothing & Textile Workers Union, Applicant v. Hornco Plastics Inc., and Horn Plastics Ltd., Responding Parties**

**Bargaining Unit - Certification - Related Employer - Separate but related plastics manufacturers operating plants in Pickering and in Whitby - Union applying for certification and proposing bargaining unit made up of all employees of first corporate respondent in Whitby - Employer submitting that related manufacturers should be treated as one employer, and that appropriate bargaining unit should include all employees in Regional Municipality of Durham - Board making related employer declaration - Board satisfied that fragmenting employer's highly integrated operation would likely cause serious labour relations problems - Regional Municipality unit found to be appropriate - Application dismissed**

**BEFORE:** Robert D. Howe, Vice-Chair, and Board Members J. A. Ronson and P. V. Grasso.

**APPEARANCES:** *Terry Hawtin, John Wensley and Tony Pileggi* for the applicant; *William S. Cook, Ernest Gourley and Guido Rinks* for the responding parties.

**DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER J. A. RONSON;**  
May 7, 1993

1. The style of cause of this application for certification is amended to add “Horn Plastics Ltd.” as a responding party.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. The bargaining unit sought by the applicant is:

all employees of Hornco Plastics Inc. at 1130 Champlain Court in the Town of Whitby save and except supervisors, persons above the rank of supervisor, office and sales staff.

4. Counsel for the responding parties seeks to have the Board treat Hornco Plastics Inc. (“Hornco”) and Horn Plastics Ltd. (“Horn”) as one employer, pursuant to section 1(4) of the *Labour Relations Act*, and to find the following unit to be appropriate for collective bargaining in the circumstances of this case:

all employees of Horn Plastics Ltd. and Hornco Plastics Inc. in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office and sales staff.

5. Horn and Hornco are two of a group of nine companies owned and controlled by an individual named Richard H. Hornung, and his son and daughter, through an elaborate corporate structure involving a family trust. Ernest S. Gourley, who testified on behalf of the responding parties at the hearing of this matter, is the President of all nine companies.

6. Horn was founded in 1979 and operates a plastic injection moulding plant in Pickering. As of the certification application date (March 25, 1993), Horn employed 25 persons who would fall within the ambit of the bargaining unit proposed by the responding parties. Hornco was founded in 1988 and operates a similar plant in Whitby. As of the certification application date there were 36 persons employed at that plant who undisputedly fall within both the bargaining unit proposed by the applicant and the bargaining unit proposed by the responding parties. (There are two other persons named on the list of employees at the Hornco plant whose inclusion has been challenged by the applicant on the grounds that they exercise managerial functions within the meaning of section 1(3) of the Act.)

7. The distance between the two plants is about ten kilometres. Both are situated within the Regional Municipality of Durham. Each plant has its own Plant Manager. Both Plant Managers report to a General Manager, who is also responsible for the operations of two other Horn Group companies: D & E Precision Tooling and Valro Manufacturing, which fabricate moulds used by Horn and Hornco. A fifth company (Nova Wire) is also involved in producing moulds, as part of the group’s horizontally integrated corporate structure. (Two of the three remaining corporate members of the group are involved in various aspects of industrial supply, and the third is involved in real estate.)

8. Hornco is (in the words of Mr. Gourley) “the child” of Horn, and does not have an infrastructure of its own to support it. The engineering, quality control, purchasing, sales, customer service, and accounting departments are all located at the Horn plant, which is also the

point of retention for production, quality, purchasing, and other records. Hornco draws upon the responding parties' common management structure on an "as required" basis, and is charged accordingly for those services. A single file server system services both companies. Horn and Hornco operate under a single marketing plan, using common sales brochures and supplying plastic parts to a customer base which has ninety per cent commonality between the two companies. Purchase orders are issued to Horn and the work necessary to fill them is then assigned to the plants based upon their workload and capacity. Approximately seventy per cent of the work done by the two companies is shared between them. Transportation services are provided to both plants by a single truck and driver.

9. Horn and Hornco use a single payroll, with all cheques being issued by Horn through the individual who is the comptroller for both companies. Hornco's payroll costs are charged back to it for accounting purposes. A pay equity review officer has ruled that Horn and Hornco are a single entity for pay equity purposes, and that they must post a single pay equity plan in both locations. The wage structure is identical at both plants, as are the job descriptions and the skills of the employees in the various classifications. Job openings and vacancies at each plant (including those for supervisory positions) are posted in both plants, and there have been nine instances in which employees at the Horn plant have applied for and obtained positions at the Hornco plant as a result of such postings. Four of the nine posted into positions covered by this application. The other five posted into supervisory positions. One of those five subsequently ceased to work as a supervisor but remained at the Hornco plant as a machine operator. Seniority is based upon the date on which the employee was first employed by either company, and remains unchanged when an employee moves from one plant to the other as a result of a job posting. There have also been approximately fifty occasions on which work and employees have been temporarily transferred between the two locations in order to maintain continuity of production. Many of those temporary transfers involved moving two or three employees from one plant to the other for a day or two, while others involved even more substantial movements of employees between the two plants.

10. The only difference between the equipment used at the two plants is its size. Horn has plastic injection moulding equipment which "goes up to 110 tons", while Hornco has similar equipment which "goes up to 550 tons". When Hornco's equipment is not being used to produce larger parts, it can be used to produce parts of the size produced by Horn, as moulds run on Horn's moulding machines can also be run on Hornco's larger moulding machines. Various pieces of "peripheral equipment" owned by Horn are shared by the two plants for use on an "as needed" basis. For example, when it is necessary to process plastic at a temperature lower than the norm, a "chiller" is coupled with the moulding machine.

11. In commenting upon the economic advantage of the single unit proposed by the responding parties, Mr. Gourley told the Board:

There is [an economic advantage]. We have a satellite facility that cannot stand on its own two feet today. It hasn't made money to date. Therefore we have centralized departments being funded by Horn.

He also told the Board that he would like to have the two plants in a single unit so that the responding parties can continue to have flexibility in moving orders, equipment, and employees between the two plants.

12. Mr. Gourley wrote the following letter to Hornco employees regarding this application:

As you are no doubt aware, a union has made an application to represent you in your relations with our company.

Several employees have asked us why the company has been so quiet. The answer is that the Labour Relations Act severely limits the rights of the company to communicate with our employees.

There will be a hearing at the Ontario Labour Relations Board on Monday, April 19, 1993 in order to determine if the union will be certified to represent you. If over 55% of the employees have joined the union, the union will be automatically certified without a vote. If between 45% and 55% of the employees have joined the union there will be a secret ballot vote to determine your wishes. If under 45% of the employees have joined the union, the application for certification will be dismissed.

I would be less than honest if I did not say that we are disappointed that an application has been made. It is our feeling that a direct relationship, without the intervention of outsiders, is preferable.

One of the promises that unions often make is job security. As far as we are concerned your job security comes from manufacturing good products and marketing them aggressively. We feel we are doing this and you are an essential component in providing job security for all of us.

In conclusion, we will keep you informed of developments as they occur. While I have expressed my opinion, I want to make it clear that the decision is yours alone to make. We will respect your decision.

He also wrote the following letter to Horn employees:

You will have noticed that a "Notice to Employees" at Hornco has been posted on our bulletin board.

A union has applied to become the bargaining agent for the employees at Hornco. We have taken the position that because of the common ownerships, wages, working conditions and transfer of employees between our plants, that the only unit would be all employees at both locations in Durham.

For your information we are enclosing a letter that is being given to our Hornco employees.

You may be contacted by a union representative about joining a union. We would ask you to consider your decision very carefully. It is a decision that effects all of us.

We will keep you informed of developments as they occur.

13. The sole witness called by the applicant was John Wensley. As an organizer for the applicant, Mr. Wensley testified that the applicant organizes on a "plant to plant system". After being informed of a plant that would like to be unionized, or targeting a plant which the applicant feels would benefit from being unionized, Mr. Wensley commences an organizing campaign in respect of that plant. If it is a multi-plant situation, upon completing the organizing campaign at the plant which has the most need to be unionized he moves on to the other plant and starts a campaign there. Mr. Wensley provided three examples of dual plant situations in which employees at one plant have been organized by the applicant and employees at the other plant have been organized by a different union.

14. Counsel for the responding parties submitted that the employees at the two plants included in the bargaining unit proposed by his clients have an inseparable community of interest, and that acceptance of the single plant unit proposed by the applicant would not be in the best interests of the employer, the union, or the employees, in view of the serious labour relations problems which it would cause. In support of that position, he relied upon the uncontradicted testimony of Mr. Gourley, and a number of Board decisions, including *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266; *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. June 736; and *Bestview*

*Holdings Limited*, [1983] OLRB Rep. Aug. 1250. Thus, he requested the Board to declare the responding parties to be a single employer, and to accept the bargaining unit proposed by the responding parties. In replying to the applicant's reliance upon *Toyota Canada Inc.*, [1991] OLRB Rep. July 922, he submitted that the case was distinguishable on the basis that there was no interchange of employees between the locations which the employer was seeking to have included in a single bargaining unit in that case. His reply to the applicant's reference to section 2.1 of the Act was that accepting the unit proposed by the applicant would not be consistent with the purposes of the Act because it would not "promote harmonious relations". In commenting upon section 7 of the Act, he submitted that if the factors set forth in section 7(3) are of relevance in determining whether or not to combine bargaining units, they are equally relevant to the Board's initial determination of bargaining unit appropriateness. He also urged the Board not to leave the parties to try to resolve potentially insoluble problems at the bargaining table.

15. Counsel for the applicant acknowledged that Horn and Hornco carry on associated or related activities or businesses under common control or direction, within the meaning of section 1(4) of the Act. However, he contended that the Board should not exercise its discretion to treat them as one employer for purposes of the Act because (in his submission) the Hornco single plant bargaining unit sought by the applicant is appropriate for collective bargaining, and the broader unit proposed by the responding parties would impair employee access to collective bargaining. He further submitted that it is not unusual for an employer to have a unionized plant and a non-unionized plant, or a plant at which employees are represented by one union and another plant at which employees are represented by a different union. It was his submission that the problems created by such situations can be resolved through collective bargaining. However, he also suggested that if the applicant is certified for the Hornco plant and subsequently succeeds in obtaining bargaining rights for the Horn plant, it would be appropriate for the Board to combine the two units into a single bargaining unit, pursuant to section 7 of the Act.

16. During the course of his able submissions on behalf of the applicant, counsel referred to several previous decisions, including *Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; *City of Toronto Non-Profit Housing Corporation*, [1982] OLRB Rep. Feb. 280; *Mobil Chemical Canada, Ltd.*, [1987] OLRB Rep. Apr. 559; *Toyota Canada Inc.*, *supra*; *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656; and *Alltour Marketing Support Services Limited*, [1982] OLRB Rep. Oct. 1383. He also referred the Board to sections 2.1 and 7 of the *Labour Relations Act*, and to section 10 of the *Interpretation Act*, R.S.O. 1990, c. 1.11.

17. As submitted by applicant's counsel, the Board's normal practice is to limit the geographic area of a bargaining unit to the municipality in which the employer's place of business is located: see, for example, *Bruce Peninsula & District Memorial Hospital*, *supra*. However, in appropriate circumstances the Board has been prepared to certify on the basis of a regional municipality comprising a number of individual municipal units (see, for example, *Adams Furniture Company Limited*, *supra*), or even on the basis of several regional municipalities (see, for example, *Harlequin Enterprises Limited*, *supra*). The Board's practice in this regard is accurately summarized as follows in Sack and Mitchell, *Ontario Labour Relations Board Practice*, at page 142:

The Board's practice is not to include employees in widely separated municipalities in the same unit, unless there are compelling reasons to do otherwise, as where the operations are integrated, there is regular interchange, the employees share a community of interest or a group of employees would be deprived of collective bargaining.

18. Applicant's counsel submitted that the purpose of section 1(4) is to protect established bargaining rights, and referred the Board to *City of Toronto Non-Profit Housing Corporation*, *supra*, in support of that proposition. (In that case, the Board indicated that the section "was not

conceived as a provision by which the Board could effect the consolidation of established bargaining rights.” Thus, the Board declined to use section 1(4) to merge an existing certificate into a larger unit and thereby augment a union’s bargaining power in a way which it had been unable to do at the bargaining table.) However, the protection of established bargaining rights is not the sole purpose of section 1(4).

19. It is clear from the Board’s jurisprudence that, in appropriate circumstances, the Board can and will issue a declaration under section 1(4) at the request of a union or an employer in the context of a certification application: see, for example, *Harwill Original Limited*, [1982] OLRB Rep. June 875. See, also *Bright Veal Meat Packers Ltd.*, [1981] OLRB Rep. March 247, in which the Board wrote, in part, as follows:

9. As a matter of statutory interpretation, the Board cannot accept the position of the applicant that section 1(4) of the Act cannot be invoked by the employer. The section in its own terms states:

... the Board may upon the application of any person, trade union or council of trade unions concerned...

As can be seen, “trade unions” and “council of trade unions” are specifically referred to. Had the Legislature desired to stop there, it could have done so very easily. But instead it chose to include the word “person”, which by virtue of the *Interpretation Act*, R.S.O. 1970, c. 225, s.30 can clearly include a “corporation” or similar legal entity which would act in the capacity of an employer. (For a comparable analysis of section 123 of the Act, see *Dover Corporation (Canada) Ltd.*, [1972] OLRB Rep. May 435.)

10. There would appear to be no basis for the Board, therefore, to find that the section, as drafted, cannot be invoked upon the application of an employer. The Board clearly assumed this in *Forest Public House*, [1974] OLRB Rep. Jan 40, although in that case there was insufficient intermingling to cause the Board to exercise its discretion to grant the employer’s request. Perhaps more significantly, the Board in *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, for the first time engaged in a comprehensive analysis of the purposes of the section. It should be noted that the Board first had this to say:

9. Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at an given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

This is not the problem in the present case. The Board went on, however, to comment on some of the other contexts in which the Board had come to apply section 1(4), and continued as follows:

12. So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited, et al*, [1971] OLRB Rep. 406.

13. It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

11. The Board finds these latter comments from the *Industrial-Mine Installations* case to be pertinent to the case now before it. Needless to say, the Board must necessarily be vigilant in assessing the apparent merit of arguments which may unduly delay the processing of an [application] for certification, and a marginal degree of integration would not likely cause the Board to proceed at length with a request that section 1(4) be applied. But the Board, on the other hand, cannot shut its eyes to the creation of a situation, through piecemeal certification, which would unreasonably restrict the employer in the manner in which it has always carried on its business, as well as creating the potential for different trade unions becoming bargaining agent for essentially integrated segments of the business.

20. In determining whether a similar approach should be adopted in the instant case, we find it useful to consider the appropriateness of the bargaining unit sought by the applicant, which, as noted above, is confined to employees at Hornco's plant in Whitby. In recent years, the Board has tended to summarize in the form of the following question the considerations which are relevant in assessing bargaining unit appropriateness:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

That formulation of the issue first appeared in the Board's decision in *Hospital for Sick Children, supra* (at paragraph 23 of that decision). A number of the factors germane to answering that question are found in paragraph 17 of the decision:

... What then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

21. Reference may also usefully be made to the following passages from *Harlequin Enterprises Ltd., supra*:

14. The case law recognizes that the Board must determine the appropriate bargaining unit, in accordance with section 6(1) of the Act, in the circumstances of each application but that more than one unit may well be "appropriate" in respect of a single employer: *The Board of Education for the City of Toronto, supra*; *Parnell Foods, supra*; *The Hospital for Sick Children, supra*; *National Trust, supra*. In considering the various possible bargaining unit configurations, however, the Board must be sensitive to the impact of that determination on the access by employees to self-organization: *The Board of Education for the City of Toronto, supra*; *Tip Top Tailors, supra*; *Canada Trustco, supra*. This sensitivity led the Board to acknowledge the appropriateness of bargaining units consisting of single plants within a municipality to facilitate collective bargaining in the retail industry in particular: *K Mart Canada, supra*; see also *Canada Trustco, supra*.

15. Further, the Board recognizes that a multiplicity of bargaining units generally has adverse consequences for the future bargaining relationship of the union and employer, such as, increasing the likelihood of strikes, increased complexity in administering several collective agreements, the triggering of jurisdictional disputes and employee "enclaves" coextensive with each bargaining unit: *Board of Governors of Ryerson, supra*; *The Globe and Mail Limited, supra*. Conversely, broader based units enhance administrative efficiency, employees' lateral mobility and industrial stability and provide a common framework for employment conditions: *Insurance Corporation of British Columbia, supra*; *Ontario Hydro, supra*. Where the more comprehensive unit would not operate to seriously impede or delay employee access to collective bargaining, the Board has favoured the broader grouping: *Board of Governors of Ryerson, supra*; *Stratford General Hospital, supra*. In short, the Board prefers the most comprehensive unit that is viable for labour relations purposes in the context of a policy of facilitating employee access to collective bargaining: *The Corporation of the City of Thunder Bay, supra*.

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17. The concept of community of interest was a common sense acknowledgment that it generally made no labour relations sense to "lump together" groups of employees whose interests were so disparate that a bargaining agent could not readily seek to respond to employees' concerns through collective bargaining. The notion of community of interest was itself elaborated and refined into a number of constituent elements, as set out in *Usarco, supra*, including the nature of the work performed, conditions of employment, skills of employees, administration, geographic circumstances and functional coherence and inter-dependence. In *Usarco*, the Board also looked to the centralization of managerial authority, the economic factor and source of work. It must be emphasized, though, that community of interest is not an "all or nothing" phenomenon. Rather, all employees of a single employer share a basic community of interest which increases for various sub-groups of those workers. The question is not "is there a community of interest amongst the employees for whom a union seeks certification?" but "is there a sufficient community of interest amongst those employees for whom certification is sought that the resulting unit is viable for collective bargaining purposes?" The Board, in effect, assesses whether the bargaining unit sought is viable and viability reflects a sufficient community of interest nexus amongst the employees to sustain collective bargaining. Thus, community of interest is not an independent, mechanical exercise but, rather, goes to the issue of viability: *Niagara Regional Health Unit, supra*; *Bestview Holdings, supra*; *Ponderosa Steak House, supra*. It is the question of viability which is paramount and that may require bargaining units defined in terms of community of interest or some broader reference where sound labour relations policy reasons so require: *The Children's Aid Society case, supra*.

22. It is clear from the facts set forth above that the unit which the applicant seeks to represent encompasses a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis. However, it is also clear from those facts that there is a very substantial community of interest among the employees at the two plants covered by the broader unit proposed by the responding parties, and that to fragment those two portions of this highly integrated operation would likely cause serious labour relations problems. Employees at both plants perform similar work to produce similar products on similar machinery. The wage structure is identical at both plants, as are the job descriptions and the skills of the employees. There is a single payroll, with all cheques being issued by Horn. Job openings at each plant are

posted at both plants, thereby facilitating employee advancement and mobility. There is also a substantial amount of employee interchange between the plants. As noted above, work and employees have been temporarily transferred between the two plants about fifty times in the past four years. Although each plant has its own Plant Manager, the Hornco plant is clearly a satellite facility highly dependent upon Horn for engineering, quality control, customer service, accounting, purchasing, sales, and work. Thus, the two plants are comprehensively integrated, and have a substantial amount of intermingling of employees through job postings and temporary transfers of work and employees. This distinguishes the instant case from *Toyota Canada Inc.*, *supra*, in which there was no intermingling, and from *Brunce Peninsula & District Memorial Hospital*, *supra*, in which the two workplaces were twenty-five miles apart, and the interchange between them was limited to one part-time employee who was being scheduled at both locations at the employee's request.

23. As indicated above, Mr. Wensly provided three examples of dual plant situations in which employees at one plant have been organized by the applicant and employees at the other plant have been organized by another union. However, that evidence is of little assistance to the Board in deciding the instant case as we have no indication of whether any of those operations are as highly integrated as those of Horn and Hornco.

24. The granting of a bargaining unit confined to the Whitby plant, with the obvious potential for another bargaining unit and a different bargaining agent at the Pickering plant, would likely hinder postings, promotions, and transfers between the two locations. It could also give rise to a variety of other serious labour relations problems including jurisdictional disputes, problems in respect of the pay equity plan (which, as noted above, is required to be posted in and to cover both plants), and problems regarding eligibility to perform work during the course of a strike or lock-out. While it might be possible for some of those potential problems to be reduced or resolved through collective bargaining, we are not sufficiently sanguine about that prospect to grant the unit requested by the applicant and thereby effectively make the responding parties' operations part of a labour relations experiment which could have very harmful results if it was unsuccessful.

25. In exercising its power under section 6(1) of the Act, the Board also considers the effect of a broader based unit upon employee access to collective bargaining. In the instant case, the applicant, in accordance with its usual organizing pattern, confined its organizational activities to employees at the Whitby plant, and has not yet attempted to organize employees at the other plant. However, in view of the substantial degree of integration of those two operations, Horn's issuance of all payroll cheques via a single payroll covering both plants, and the relatively large amount of employee interchange between the two plants, it may reasonably be inferred that the existence of Horn's Pickering plant, and its potential relevance to this application, could readily have been ascertained by the applicant through discussions with Hornco's Whitby plant employees. Moreover, in the absence of any attempt on the part of the applicant to organize the employees at that plant, it would be premature for the Board to conclude that adopting a bargaining unit structure which encompasses both plants will result in the wishes of employees at the Whitby plant to engage in collective bargaining being frustrated by a disinclination in that regard on the part of employees at the Pickering plant. Although this possibility is one of the factors which must be duly considered by the Board in determining an appropriate bargaining unit, in the circumstances of this case it does not outweigh the serious labour relations problems which would likely be caused by accepting the unit proposed by the applicant and thereby bifurcating a highly integrated dual plant operation.

26. We find no merit in counsel for the applicant's contention that, as a result of the two letters quoted above, the atmosphere at the plants is no longer conducive to the employees being

able to express their two wishes regarding unionization. As submitted by counsel for the responding parties, the contents of those letters fall within the ambit of an employer's freedom to express its views, under section 65 of the Act. The Board has traditionally recognized that employees are aware that employers are generally not in favour of having to deal with employees through a union, and that employer expressions of that view, in the absence of any surrounding circumstances which would cause employees to place undue emphasis on such statements, do not constitute undue influence or otherwise contravene the Act: see, for example, *Dylex Ltd.*, [1977] OLRB Rep. June 357 (application for judicial review dismissed: 77 CLLC ¶14,112). There is no evidence of any such circumstances in the instant case. In his letter to Hornco employees, Mr. Gourley expresses the opinion that "a direct relationship, without the intervention of outsiders, is preferable." However, he also emphasizes that the decision is the employees' alone to make, and that their decision will be respected. The letter to Horn employees is equally innocuous, and also clearly falls within the ambit of an employer's freedom to express its views, under section 65 of the Act.

27. Having regard to all of the circumstances, the Board finds it appropriate to exercise its discretion under section 1(4) to declare that the responding parties constitute one employer for purposes of the *Labour Relations Act*. Moreover, in view of the extensive integration of the two plants, the aforementioned interchange of employees between them, the substantial community of interest which exists among employees at the two plants, and the serious labour relations problems which would likely result from fragmenting the employer's integrated operations at those two plants, the Board finds that all employees of Horn Plastics Ltd. and Hornco Plastics Inc. (as one employer under section 1(4) of the *Labour Relations Act*) in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, and office and sales staff, constitute a unit of employees appropriate for collective bargaining. Although the more narrow unit proposed by the applicant might arguably serve the purpose identified in paragraph 1 of section 2.1 of the Act, it would not serve the other purposes set forth in that provision and, in particular, would not "promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions."

28. The Board is satisfied on the basis of all the evidence before it that less than forty per cent of the employees in the bargaining unit on March 25, 1993, the certification application date, were members of the applicant on that date or had applied to become members of the applicant on or before that date.

29. Accordingly, the application is hereby dismissed.

#### **DECISION OF BOARD MEMBER P. V. GRASSO; May 7, 1993**

1. With respect, I dissent from the majority decision. I would have granted the bargaining unit that was proposed by the union.

2. The central question is whether the unit proposed by the union is a viable one that will not cause serious labour relations problems for the employer.

3. The problems raised by the employer in response to the union's proposed unit are not so serious, in my view, as to create an obstacle to an otherwise appropriate bargaining unit. None of the issues raised are ones which cannot be bargained about, and the history of employee interchange is not significant enough to cause any serious labour relations problems.

4. Granting the smaller unit may cause the employer some administrative inconvenience, but that alone does not constitute a serious labour relations problem that should cause the Board

to deny the applicant the bargaining unit it desires. The union is entitled to be granted *an* appropriate bargaining unit. The Act does not require it to apply for the *most* appropriate unit.

5. The majority decision also goes against the Board's well established practice of describing bargaining units outside of the construction industry in terms of the municipality in which the workplace(s) is (are) located. This practice reflects an attempt to balance considerations of viability or rationality of bargaining units against the right of employees to freely organize themselves, and it also provides a measure of predictability to the labour relations community. This practice is followed unless there are compelling reasons to do otherwise, reasons which, as I described above, I believe are absent in this case.

6. As a result, I would have granted the applicant's proposed bargaining unit, thereby facilitating access to collective bargaining.

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**3150-91-R; 3151-91-R** Millwright District Council of Ontario on its own behalf and on behalf of Local 1244, Applicant v. **Inplant Contractors Inc.** and 911846 Ontario Limited c.o.b. as Flint Industrial Services and Flint Riggers and Erectors Inc., Responding Parties

**Construction Industry - Related Employer - Sale of a Business - Board rejecting union's submission that certain individual constituting "key person" and that brief tenure of other individual, found to be "key person", constituting contribution of the business or part of the business of predecessor to alleged successor employer - Successor rights application dismissed - Board not satisfied that responding companies operating under common control or direction - Related employer application dismissed**

**BEFORE:** *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Kurchak*.

**APPEARANCES:** *Marisa Pollock* and *Henry Martinak* for the applicant; *W. Thornton*, *A. Markham* and *Russ Derseweh* for the responding parties.

**DECISION OF THE BOARD;** May 3, 1993

1. These are applications made pursuant to the provisions of sections 1(4) and 64 of the *Labour Relations Act*. The Millwright District Council of Ontario on its own behalf and on behalf of its Local 1244 ("the Millwrights" or "the union") alleges that there has been a sale of a business or part of a business from Inplant Contractors Inc. ("Inplant") to 911846 Ontario Limited c.o.b. as Flint Industrial Services ("Flint Canada") and Flint Riggers and Erectors Inc. ("Flint USA"), or that the responding parties are related employers within the meaning of the Act.

2. On the second day of hearing, the responding parties informed the Board that they do not dispute that Flint Canada and Flint USA are companies carrying on related activities under common control and direction. Counsel indicated, however, that the companies oppose the issuance of a declaration under section 1(4) of the Act with respect to these two companies, on the basis of the Board's discretion.

## **I - The Evidence**

3. Ann Markham and Russ Derseweh gave evidence on behalf of the responding parties. The applicant called no evidence. The Board also received a considerable amount of documentary evidence in the way of invoices, accounts receivables summaries, T4 forms, corporate documents and other material, which we have reviewed in depth.

4. This case essentially revolves around the involvement of Ann Markham and Tim Hay in Inplant and subsequently in Flint Canada. There is no dispute that Inplant is bound to the provincial Millwright collective agreement. Inplant conducted business in Southern Ontario from about July 1986 to December 1990, when it went into receivership. Flint Canada was incorporated in January of 1991, essentially to conduct business in Canada for Flint USA, which is located in Flint, Michigan. Ann Markham is an officer and director of Inplant, which is no longer in business, and is also an officer and director of Flint Canada. The applicant alleges that the events of January 1991 constitute a sale of a business or part of a business from Inplant to Flint Canada and Flint USA. In the alternative, the applicant alleges that the companies carry on related activities under common control or direction.

### **Inplant - 1984 to April 1987**

5. Inplant was formed in Chatham in 1984 by Ann Markham and her ex-husband, Glenn Markham. The company was formed as a result of Glenn Markham's interest in business opportunities in the area of supply of labour to industrial plants. Mr. Markham had worked briefly for a company in the area pursuing these types of contracts for the company. He then decided to go into business on his own. The Markhams colloquially referred to this type of business as "rentabody". Essentially, it consists of supplying labour for such purposes as maintenance during plant shut-downs.

6. Inplant was formed with ownership split equally between the Markhams. Glenn Markham was the president, Ann Markham the secretary. Both were directors. Both guaranteed the debts of Inplant. These began as a \$5,000 loan and fluctuated with the company's line of credit. The day to day business of the company was managed by Glenn Markham. He took requests for labour and arranged for workers to fill the requests. A constant part of his responsibilities was the active pursuit of new contracts. Ann Markham did record-keeping for the company, prepared the payroll and typed invoices on Glenn Markham's instructions. The company operated out of the Markham home. During this period, Ms. Markham also worked full-time at an accounting firm. She has had training in accounting and bookkeeping although she is not a certified accountant.

7. From 1984 to 1987, when Glenn Markham sold his interest in Inplant to Tim Hay, most of the company's work was in the business of supply of skilled labour. The company also did some machinery moving. The largest customer of Inplant during this period was Navistar International Corporation Canada ("Navistar"), to which Inplant supplied labour for the purpose of plant maintenance. Apparently, early in the company's history, Inplant used workers from the Millwrights, the Ironworkers and the Operating Engineers unions. However, it stopped using Millwrights in or around November 1984, as a result of the refusal by the Millwrights to agree to a separate collective agreement covering maintenance work, at lower wage rates.

8. In June of 1986, the Markhams separated. Ann Markham continued to do some book-keeping work for the company from her home. In July of 1986, Glenn Markham located Inplant in an office in Chatham, after which the work of preparing invoices was no longer part of the work that Ann Markham did for the company.

**Inplant - April 1987 to January 1991**

9. In April of 1987, Glenn Markham sold his half-share of the company to Tim Hay, an acquaintance who is an ironworker by trade. Hay had worked for Inplant before and for a time also had his own welding business. Upon this sale, Ann Markham became the president and Tim Hay the secretary-treasurer. After the sale, the company continued to do work for Navistar and other companies requiring labour for maintenance purposes. As well, it continued to do some machinery moving. However, it started doing a significant amount of work in structural steel erection and installation.

10. In 1988, Ann Markham quit her full-time job in the chartered accountant's office. This was the result of increased bookkeeping demands from Inplant as a consequence of some major structural steel contracts as well as her increasing freelance accounting work for various clients. The work which Ann Markham performed for Inplant after Tim Hay bought into the company was not substantially different from before. She continued to do bookkeeping and payroll and preparation of invoices. Tim Hay was responsible for the day-to-day management of the firm. On one occasion, as a result of a grievance filed by the Millwrights, Ann Markham and Tim Hay together attended a meeting with a Labour Relations Officer at the Board's offices. She states that she attended at Hay's request. She has also gone for drinks with Inplant customers with Hay, but is generally not involved in soliciting work.

11. In 1988, Inplant entered into a lease for office space at 21 Arnold Street in Wallaceberg. Ann Markham personally guaranteed this lease. The company operated out of these premises until its demise.

12. In the first few days of January, 1991, Inplant went out of business. The bank that held its operating line of credit called the loan and froze Inplant's account. At this time, Inplant had debts of about \$200,000. It also had substantial accounts receivables. Inplant owned equipment of about \$150,000 in value, some of which was seized by the bank. Eventually, as a result of Ann Markham's ability to pay off some of the debt and collect on some of the accounts receivables, the bank allowed her to discharge her personal guarantee on Inplant's debts. Some of the equipment was sold off to various buyers. Some of it is still in Hay's possession.

**Flint USA and Flint Canada**

13. Between March 1987 and December 1990, one of Inplant's customers was Flint USA. Flint USA is a company based in Flint, Michigan, owned by Deforest Rinz. The business of Flint USA is rigging and erecting, machinery moving, and dismantling and relocating plants. Flint USA is also engaged in the supply of skilled trades in the United States. Most of its customers are located within a 300 mile radius of greater Detroit, although in relocating plants for customers, the work may take Flint beyond the Detroit area. Flint USA does about \$3 million in business each year.

14. Between March 1987 and December 1990, Inplant supplied labour to Flint USA on 5 jobs, with a total value of about \$30,000.00. The value of this work represents less than 1% of the total sales of Inplant during this period. These jobs involved Flint USA contracts for the dismantling of plants located in Canada and the relocation of the machinery in the plants to the United States. Inplant supplied labour to Flint USA for the work in Canada on these jobs.

15. In early January, after Inplant ceased business, Rinz phoned Ann Markham. The purpose of the call was to inquire about a truck belonging to Flint USA that was in possession of Inplant, and had been used on a job. During the course of this conversation, Markham explained

to Rinz Inplant's circumstances. Among other things, she asked whether he was interested in purchasing some equipment.

16. A few days later, Rinz phoned Inplant and asked Markham to go to Flint for a meeting. Other than saying that he had something he thought she might be interested in, he did not elaborate on the purpose of the meeting. Markham went to Flint the same day to meet with him. At this meeting, Rinz showed her a purchase order that he had for a job to remove some equipment for Lignotcc in Cambridge. He stated that he wanted to set up a Canadian company and asked Ann if she was interested in handling the accounting and being the Canadian resident director for the company. He also mentioned other work Flint USA was hoping to line up in Canada.

17. Russ Derseweh testified that it was his idea to have Flint USA set up a Canadian branch company. Derseweh is the general manager of Flint USA. He stated that the idea for the Canadian company originated when he received a request to quote on the re-location of the Lignotoc plant from Cambridge, Ontario to New Jersey. In addition to the Lignotoc job, there were at least four other long-time clients of Flint USA who indicated that they had future work in Canada relocating their Canadian plants to the United States. As a result of this, Derseweh felt that there was going to be a lot of future work in Canada from plant closings and relocations because of the Canadian economy, and that Flint USA should form a Canadian company in order to be more competitive in Canada. Previously, when Flint USA did work in Canada, it used subcontractors to supply labour (such as Inplant). By forming a Canadian subsidiary, Flint USA could cut out the middleman mark-up by hiring their own labour directly.

18. Derseweh spoke to Rinz about the idea of forming a Canadian company. Rinz phoned his lawyer and accountant, and determined, among other things, that a Canadian director was required. The result of this was the telephone call to Ann Markham.

19. Before this telephone call, Ann Markham had met Rinz on only one occasion. In the fall of 1986, she and Glenn Markham spent an evening with Rinz and his son. Although this was after their separation, the Markhams were making an attempt to reconcile. Rinz and Glenn Markham discussed the possibility of combining their efforts to do business together. Ann Markham spent some time chatting socially to Rinz and, among other things, talked to him about the nature of her work and background in accounting and bookkeeping.

20. Apparently, the discussions between Rinz and Glenn Markham did result in something. In 1987, Canam Riggers Ltd. was incorporated with Deforest Rinz as president and Glenn Markham as Vice-President. We have no evidence as to what this company does, nor any evidence as to its functional relation, if any, to the companies in these proceedings.

21. In any event, when Ann Markham met with Deforest Rinz in early January of 1991, the proposal that Rinz made was that she become the Canadian resident director and a officer of a new company, and that she handle accounting and payroll work for the company. She would be paid \$500 each week for her work. In a few days, Ann Markham called Rinz and told him that she would accept the offer. Rinz and Derseweh came to Canada, met with Markham and they arranged for the incorporation of the new company, as of January 30, 1991. Markham became the president of the company, and Rinz the secretary-treasurer. Rinz is the sole shareholder.

22. In evidence, Markham stated that she did not know why she was the named the president and Rinz the secretary-treasurer. She does not recall any discussion with Rinz or the lawyer who incorporated the company as to the meaning of being the president, or the obligations and powers of being a director and officer. She stated that she is unaware of the powers, if any, given to her as a director and officer by the by-laws. She does not see herself as having any power of

independent decision-making within the company. She stated that she does not have the authority to buy anything, even a calculator, without authorization.

23. The new company decided to rent premises on a sub-lease from Markham, at 21 Arnold. As set out earlier, she had personally guaranteed the lease for Inplant at this location. Markham stated that she mentioned the availability of this space to Rinz, who agreed to take some of it for Flint Canada. In addition to Flint Canada, there is an accountant that also sub-lets space at 21 Arnold. Both Flint Canada and the accountant pay their rent directly to the landlord for their portion of the rent. The Flint Canada office is used by Markham for her bookkeeping work for the company. As well, she continues to do freelance accounting for various firms and individuals. The office equipment belongs to Markham and is part of the equipment of Inplant that was released to her. Russ Derseweh also uses the office at 21 Arnold Street when necessary as a base for Flint Canada and Flint USA's work in Canada.

24. As set out above, there were a number of job leads in Canada that led Rinz and Derseweh to incorporate Flint Canada. Most of these possibilities did in fact eventually result in work. It appears that about four-fifths of the work that Flint USA did in Canada in the first year-and-half of the operation of Flint Canada was done for Flint USA clients. Where work is obtained through Flint USA clients located in the United States, Flint USA holds the contract. Flint USA in turn "sub-contracts" the labour portion of the contract to Flint Canada.

25. When Flint USA performs a job in Canada, Derseweh may be on site 1 or 2 days a week. As well, Flint USA has a number of supervisors (about 4), each of whom is assigned the day to day supervision of a particular job. On jobs in Canada, Flint USA has at least one supervisor on the site for the duration of the job. The employees, however, are Canadian workers, hired primarily from the Ironworkers hiring hall. The American supervisors report the hours worked to the Flint USA office in Flint, Michigan. In turn, this office sends this information to Ann Markham so that she can make up the payroll for the Canadian workers.

26. In addition to the work for Flint USA customers, Flint Canada has also done some work for Canadian companies. This work might be machinery removal, equipment rental, rental of equipment plus an operator, or supply of skilled labour. This last represents only a very small portion of the work. Most of these contracts were obtained through Tim Hay, and were reasonably small in value. Near the beginning of Flint Canada's existence, Derseweh decided to hire Tim Hay as a supervisor. Derseweh states that he hired Tim Hay because of his field experience. He also understood that Hay had good contacts with the local Ironworker hiring hall and could obtain good workers. The original suggestion to get in touch with Hay in fact came from the Ironworker local business agent. When he was hired, Hay told Derseweh that he could get some work for Flint Canada through his previous contacts. Hay only stayed with Flint Canada for 4 or 5 months. When he left, Flint Canada ceased to do work for most of the customers that Hay had dealt with. Derseweh stated that he did not consider the work obtained through Hay to be any significant benefit to Flint, and did not seek to pursue any of it after Hay left.

27. Flint USA has an extensive collection of equipment. When it has a job in Canada, it brings its own equipment over the border. It did not buy any of the equipment of Inplant. Rinz personally bought one truck from Inplant. This truck has not been used on any Flint jobs in Canada. A number of the workers that started with Flint Canada had been regular Inplant employees. Of 12 employees that have worked with Flint Canada, 7 have also worked for Inplant. By the time of the hearing, only 2 former Inplant employees remained as "regular" employees of Flint Canada. "Regular" in this context means essentially that they are regularly called for work when

Flint Canada needs workers. Some of the employees who left Flint Canada are now working with Tim Hay in another company.

### Argument

28. Counsel for the union submits in argument that Ann Markham was much more involved in the management of Inplant than she tried to suggest in her evidence. She professes ignorance at many turns as to the workings of the business, but this is simply not credible. The evidence shows that she attended meetings with clients, a meeting with a Labour Relations Officer, and that she was in fact both an officer and director of Inplant, with all the responsibilities and powers that those positions entail. Further, counsel states, the evidence shows a history of co-operation between Flint USA and Inplant on various machinery removal jobs. In addition, there was even a discussion between Glenn Markham and Deforest Rinz about joining forces, subsequently manifested in Canam Riggers Ltd.

29. When Flint USA decided to form a Canadian company, they were aware of Inplant. Part of the reason for hiring Tim Hay was the hope that Hay could bring to Flint Canada some of the work that Inplant had formerly done. The type of work Hay did bring to the company was a disappointment to Derseweh, but the fact remains that but for Hay's involvement with Flint Canada, this work would not have come into the company.

30. Most importantly, in counsel's submission, is the fact that Ann Markham and Tim Hay transferred their services to Flint Canada. Hay was unquestionably the key person at Inplant and in going to work for Flint Canada, he effectively transferred the goodwill of Inplant to the new company. In acquiring the services of Markham and Hay, Flint Canada acquired the basis of an economic organization. Without them, Flint Canada had no presence in Canada and no contacts with customers or a labour force.

31. Counsel referred the Board to the following cases: *Gallant Painting*, [1991] OLRB Rep. Sept. 1051; *Clean & Brite Laundry*, [1980] OLRB Rep. July 957; *Ably Concrete Floor Limited*, [1991] OLRB Rep. May 579; and *Doran Construction Limited*, [1984] OLRB Rep. Aug. 1108.

32. Counsel for the company, on the other hand, submits that Ann Markham cannot be considered the driving force of Inplant. Although there is no question that she shared in the profit and loss of the company, she cannot be considered the "key person" in the sense of embodying the business. Further, although there is some minor overlap between the type of work performed by Flint Canada/Flint USA and that done by Inplant, these businesses are quite different in nature. At the time Inplant went into receivership, its main business was welding and structural steel, contrasted to Flint USA which specializes in plant liquidation and relocation.

33. With respect to those elements of Inplant's business which can now be found at Flint Canada, counsel submits they are not significant. The arrangement to lease the former premises of Inplant was a convenience only. The decision to form Flint Canada was made even before the company considered hiring Tim Hay, and Hay was not recruited by the company. The continuity of some of the labour force is not significant, it is suggested, in the context of a hiring hall. In any case, Flint Canada now uses a number of employees dispatched from the Ironworkers local union, who have not worked for Inplant, in addition to Flint USA's pre-existing supervisory staff.

34. Counsel disputes that without Markham and Hay, Flint Canada had no basis on which to start business in Canada. Although it had no company in Canada, Flint USA had a number of clients based in the United States, which resulted in the vast majority of the work performed by

Flint Canada. Flint USA has always done work in Canada - what it did not have the vehicle to do before was to employ its Canadian labour directly.

35. The responding parties also question the motives of the union in bringing this application. During the hearing of this case, it became apparent that Glenn Markham was co-

operating with the union and providing the union with information in respect to this case. However, it also came out in the evidence that Markham has formed a non-union company which is doing "rentabody" work under contract with Navistar. Counsel for the companies asks rhetorically why the union has not sought bargaining rights with respect to Glenn Markham's company (which, it is submitted, is doing exactly the type of work that Inplant was doing at the time that the union and Inplant signed the voluntary recognition agreement), and is instead seeking to expand its rights to cover the operations of Flint USA.

36. Counsel relies on the following cases: *Widcor Limited*, [1989] OLRB Rep. Jan. 66; *Stebill Limited*, [1989] OLRB Rep. Apr. 384; *Hardrock Forming Company*, [1987] OLRB Rep. July 1003; *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. Dec. 1724; *Yola Construction Ltd.*, [1990] OLRB Rep. Mar. 358; *Chandelle Fashions*, [1982] OLRB Rep. June 828; and *Arbis Construction Ltd.*, [1983] OLRB Rep. Dec. 1959.

### Sale of Business

37. Sections 64(1) and (2) stated prior to January 1, 1993:

64. (1) In this section,

"business" includes a part or parts thereof;

"sells" includes leases, transfers and any other manner of disposition and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

38. Amendments to the *Labour Relations Act*, including amendments to section 64, came into force on January 1, 1993. Sections 64 (1) to (2) now state:

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

39. This case was argued before us after January 1, 1993. No argument was directed to whether the changes have any effect on the outcome of this case, there was no reliance on any of the new provisions in section 64, and we do not consider the changes relevant to our determinations.

40. As discussed in the cases to which we were referred, section 64, as it existed prior to January 1 and now, is remedial legislation designed to preserve bargaining rights and prevent their erosion or frustration as a result of changes to the structure of a business. In *Tatham Company*, for instance, the Board stated:

20. Section 55 [now section 63] prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of “vested interest” which becomes rooted in the business entity, and like a charge on property, “runs with the business.” To accomplish this objective, the statute gives a very special meaning to the word “sale”, envisages that bargaining rights can be continued in a severable “part” of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

41. As to the application of section 64 to specific fact situations, the Board stated in *Gallant Painting, supra*:

42. Given the remedial purpose of section 63, the primary focus of the Board in applications under section 63 is what is the “business” of the predecessor to which the bargaining rights have become attached or “vested”. Rather than focusing upon the legal forms and commercial transactions which surround the circumstances which gave rise to the section 63 application, the Board looks to the predecessor’s “business” and determines if this has been “disposed” of in some manner to the successor or if there has been a continuum of that business by the successor. Have the essential elements of the predecessor’s “business” been transferred to the successor thereby enabling the successor to continue the business? (See for example *Grand Valley Ready-Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663)

42. On what constitutes “the business” or “part of a business” of a company, the Board also stated in *Tatham Company*, at paragraph 26:

... Factors which may be sufficient to support a “sale of business” finding in one sector of the economy may be insufficient in another. In some industries, a particular figuration of assets -- physical plant machinery and equipment -- may be of paramount importance; while in others it may be patents, “know-how”, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

43. In *Gallant Painting*, the Board found that in the maintenance painting business, the essence of the business, its “total economic organization”, resides in the experience and expertise of its management personnel. This is because in a bid-oriented industry, the crucial elements to the success of a business are the expertise to price and bid on jobs and the skill and ability of personnel who can ensure that the job is completed within the limits of the bid (see para. 47). The Board found that by acquiring the skills and expertise, built-up experience, reputation and contacts of

John Gallant, Lindsay Maintenance acquired the essential elements of Gallant Painting, which enabled it to embark into the painting business.

44. *Gallant Painting* is but one recent example of a “key man” case. In these cases, the Board has recognized that in certain types of businesses, the essence of the economic activity is found in one or more key persons. Where a key person transfers his or services to another entity, taking with him or her the essential elements of the business upon which its economic activity is based, this constitutes a sale of a business. Most of these cases have arisen in the construction industry.

45. In the case before us, the applicant submits that Ann Markham and Tim Hay constitute “key persons” in the sense applied by the Board in these cases. We are prepared to accept that to a large degree, the basis of Inplant’s economic activity lay in its people. Although Inplant clearly had physical assets (equipment and tools) which were essential to the jobs it undertook, these were not the essence of its business. When Glenn Markham was with Inplant, it was primarily his skills, contacts and bidding ability which formed the basis of the company. When Tim Hay bought Markham’s share, he brought to Inplant his own skills, contacts and bidding ability.

46. To the extent that Inplant was successful during the time it was in business, it was due to the efforts of Glenn Markham and then Tim Hay. The primary role that these individuals played in the business of Inplant is demonstrated by the significant change in the company’s business when Hay took over. Since Hay is an ironworker by trade and has contacts and experience in that area, he moved the business of Inplant into structural steel erection. Structural steel jobs, which had not been performed by Inplant under Markham, began to constitute about half of the company’s business.

47. If Tim Hay can therefore be considered a “key man” in whom the business of Inplant resided, was there a transfer of the business when he joined Flint Canada? On balance, we do not think so. The evidence establishes that Flint Canada came into existence as essentially a Canadian subsidiary of a well-established company, Flint USA. Together, these two companies intended to take advantage of expanding business opportunities in Canada by having in place the corporate vehicle to hire a work force directly instead of subcontracting for labour as Flint USA had done in the past. The type of work that Flint USA/Flint Canada undertook in Canada after January of 1991 was the same type of work that Flint USA had done in Canada before. Flint USA has always specialized in machinery moving, primarily related to plant relocations. It had the management, the supervisory staff, the equipment, the name and the contacts to move this business into Canada. It did not need to acquire the business or part of the business of Inplant in order to do this type of work. The genesis of Flint Canada was Flint USA, not Inplant.

48. Indeed, the evidence shows that the decision to start doing work in Canada through Flint Canada was made before any thought of hiring Tim Hay. Tim Hay was hired because he was a field supervisor, and because he knew the local labour force. Undoubtedly, his experience as an estimator and his contacts with Canadian clients made him an attractive employee. However, the evidence does not point to his hiring as being an element of Flint Canada’s ability to start doing business.

49. It is also true that the hiring of Tim Hay allowed Flint Canada to take advantage of some work from local customers, with whom Flint USA did not have a prior relationship. Thus, it is fair to say that Tim Hay contributed to the economic activity of Flint Canada and Flint USA. However, his contribution was only a matter of the *amount* of work undertaken. His contribution consisted, in addition to his supervisory duties, of obtaining some local contracts. Hay’s tenure with Flint Canada did not add significantly to the company’s ability to do business in Canada, nor

did his departure five months later detract from the company's continuing economic activity. It seems to us that it would be unrealistic to characterize his brief tenure as the contribution of the business or part of the business of Inplant to Flint Canada.

50. The facts of this case are distinguishable from those in *Gallant Painting, supra*, where the hiring of John Gallant (who was the "key person" of Gallant Painting) was the essential factor that allowed Lindsay Maintenance to start up a maintenance painting business.

51. And what of Ann Markham's continued presence at Flint Canada? We disagree that she could be considered a "key person" of Inplant, in the way this Board has applied that concept. Without in any way wishing to minimize her contribution to the business of Inplant, her role in the company was essentially in the areas of bookkeeping, accounting and payroll services. If Ann Markham had not been available, Inplant could have contracted for these services elsewhere. We also do not mean to suggest that Ms. Markham did not have a hand in the management of Inplant. It is quite likely that she did. However, we make a distinction between persons who have some authority to guide an enterprise, and persons who can be considered as "key persons" in the way that concept has been applied by the Board. The fact that Ms. Markham shared in the ownership and probably had some say in the direction of Inplant is not sufficient to make her a "key person" since we are unable to find that her contributions to Inplant were either uniquely hers to give, or constituted the essential bases of the economic activity of the company. Thus, we are unable to find that in contracting for her services or appointing her an officer and director of Flint Canada, Flint Canada acquired the business or part of the business of Inplant.

52. Having determined that neither the hiring of Ann Markham nor of Tim Hay should in itself lead to a finding of a sale of a business or part of a business, we are not convinced that there are any other factors which might lead to this result. There are elements of continuity between the work of Flint Canada and the work of Inplant. These elements consist of: the office space, some of the customers, and some of the workers. In the context of this case, we do not find that these elements, taken together with the presence of Markham and Hay, constitute the sale of a business or part of a business. At best, they are discrete assets that supplement the pre-existing business of Flint USA. Although in another situation, these types of factors may form a coherent economic vehicle, here they merely constitute elements of a business that for various reasons attached themselves to Flint Canada. Other assets of Inplant, such as the equipment and tools, did not become part of Flint Canada.

### **Related Employers**

53. Section 1(4) of the Act states:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

54. In *Brant Erecting and Hoisting*, the Board set out the purposes of section 1(4) and in particular, the effect of the phrase "whether or not simultaneously":

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil.

Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [63] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section [63] has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section [63]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of businesses between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section [63] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

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15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in “associated or related activities or businesses” since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be “related” within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the “associated or related activities or businesses” need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business or endeavour or even contemporaneously economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are “related” or “associated” because they are of the same character, serve the same

general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be “related” within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of “privity of contract” or “the corporate veil”.

55. It has often been noted that section 1(4) requires the Board to be satisfied as to three conditions before a common employer declaration can be considered: 1) there must be more than one corporation, firm, individual, syndicate or association; 2) these entities must be engaged in associated or related business activities and 3) these entities must be under common control or direction.

56. In the present case, we are satisfied that the first two criteria are met. With respect to the third, in *Jen-Ry Utility Contracting Company Limited*, *supra*, the Board discussed the meaning of having “control” or “direction” of a company for the purposes of section 1(4):

16. All of these cases make it clear that the test for “control” under section 1(4) of this Act envisions the ultimate power to “call the shots” where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a “related employer” for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example, say “yes” or “no” to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g., *Great Atlantic & Pacific Company Limited*, *A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms, (e.g. *J. H. Normick, Foley*, *supra*, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945,) or it may come from a combination of the two, (*Kennedy Lodge*, *supra*, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214).

57. Usually, the existence of common shareholders, directors or officers is an indicia of common control and direction. In a small business, in particular, it is not surprising to find that where one or two persons constitute the ownership, directorship or executive, these persons also hold the authority to “call the shots”. On the other hand, it is also not unusual to find persons occupying the positions of directors or officers in a corporation who do not in fact hold the ultimate power to make decisions affecting labour relations. Thus, the Board looks beyond the paper structure of a company to determine where the real power to make labour relations decisions resides. In some cases, the Board has found companies which do not share common shareholders, directors and officers to be under common control and direction: see, for instance, *Widcor Limited*, *supra* and *Metropolitan Toronto Condominium Corporation #880*, [1992] OLRB Rep. Dec. 1145.

58. In the case before us, we are not convinced that Inplant and Flint Canada (or Flint USA) are companies which operate under common control and direction. What is most significant to us is the history and purpose of the formation of Flint Canada. There is no doubt that Flint Canada was formed for one purpose: to serve the business of Flint USA. Thus, the locus of control and direction of Flint Canada’s operations is the same as that of Flint USA. Ultimately, it is Deforest Rinz, the owner of both companies, who has authority to make the essential decisions affecting the labour relations of the companies, either personally or through Russ Derseweh.

59. In order to incorporate a company in Canada, Rinz needed to find a Canadian director. To this end, he approached Ann Markham. No reason is given as to why Markham also became the president of Flint Canada. However, there is also no reason to conclude, based on the evi-

dence, that her position allows her any level of authority over the economic activities of Flint Canada. Not only does she appear to have very limited powers of independent decision-making within Flint Canada, but, as stated above, Flint Canada itself exists essentially to be a Canadian vehicle to supply labour to Flint USA. The work of Flint Canada is dictated by the work of Flint USA. There is no evidence that Flint USA and Inplant operate under common control and direction.

60. We are thus satisfied that Ann Markham's position within Inplant and Flint Canada do not lead to a finding that the responding parties in these applications operate under common control or direction, and there is no other basis for such a finding. Although it has been conceded and it is clear on the evidence that Flint Canada and Flint USA meet the conditions for a finding under section 1(4), no purpose would be served by issuing a declaration. In the result, the applications under sections 1(4) and 64 are dismissed.

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## **2823-92-U Kenneth Edward Homer, Applicant v. International Brotherhood of Electrical Workers and its Local 636 and St. Catharines Hydro-Electric Commission, Responding Parties**

**Discharge - Duty of Fair Representation - Evidence - Practice and Procedure - Unfair Labour Practice - Applicant alleging that union's failure to take his discharge grievance to arbitration violating the Act - At conclusion of applicant's case, Board entertaining union's motion for non-suit without requiring it to elect whether it wished to call evidence - Board satisfied that applicant had presented no basis, on his own evidence, upon which application could succeed - Application dismissed**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair.

**APPEARANCES:** *Kenneth E. Homer* and *Valerie Homer*, for the applicant; *Bernard Fishbein*, *Graeme Aitken*, and *Harold Vance*, for Electrical Workers, Local 636; *Joni Smith*, *Eric Valois*, and *Ilana Liberman*, for St. Catharines Hydro-Electric Commission.

**DECISION OF THE BOARD;** May 14, 1993

1. At the hearing on May 10, 1993 in this matter, the St. Catharines Hydro-Electric Commission ("St. Catharines Hydro"), which filed an intervention, was made a responding party.

2. This is an application under section 91 of the *Labour Relations Act*, in which the applicant alleged that the responding trade union had treated him in a manner contrary to section 69 of the Act in that it had improperly refused to take his discharge grievance to arbitration. The applicant requested that the Board order the trade union to take his grievance to arbitration, to pay all the cost thereof, and to compensate him for all lost wages and benefits plus interest.

3. At the conclusion of the applicant's case, the responding trade union made what is referred to in the courts as a motion for non-suit, which the trade union requested be dealt with without it being required to elect whether it wished to call evidence. Upon considering the representations of the parties in that respect and with respect to the merits of the trade union's motion, I ruled, orally, that the Board had the jurisdiction to hear the motion without putting the trade

union to its election and, that it was appropriate for the Board to do so in the circumstances of this case. I further ruled, also orally, that the complaint should be dismissed. Although I provided brief oral reasons at the time, I wish to provide more complete written reasons as follows.

4. I was satisfied that the Board has the jurisdiction to hear a motion for non-suit without putting a party to its election for the reasons given in *Hurley Corporation*, [1992] OLRB Rep. Aug. 940. I was also satisfied that, in the circumstances as revealed by the evidence presented by the applicant, that it was fair and reasonable to hear that motion in this case.

5. Section 69 of the *Labour Relations Act* provides that:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Often referred to as establishing a “duty of fair representation”, section 69 requires a trade union to represent employees of whom it is the exclusive bargaining agent in a manner which is free of ill-will and which is neither arbitrary nor discriminatory. Complaints that a trade union has failed to represent an employee fairly generally involve a refusal by the union either to file a grievance for the employee, or, if a grievance was filed, to take the grievance to arbitration. Of course, the mere fact that a trade union has refused to take a grievance to arbitration does not mean that it has breached the duty of fair representation imposed by section 69. In *Canadian Merchant Service Guild v. G. Gagnon*, [1984] 1 SCR 509 at page 527, the Supreme Court of Canada reviewed the principles applicable to a trade union’s duty of fair representation as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee on the one hand and the legitimate interest of the union on the other.
4. The union’s decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

This is both a useful general guideline for assessing a trade union’s representation and is consistent with the Board’s approach to fair representation complaints.

6. Honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not, of themselves, constitute “arbitrary” conduct within the meaning of section 69. In other words, a trade union has a kind of “right to be wrong”. Terms like “implausible”, “so reckless as to be unworthy of protection”, “unreasonable”, “capricious”, “negligent”, and “demonstrative of a non-caring attitude” have been used to describe conduct found to be arbitrary within the meaning of section 69 (see, *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861, *I.T.E. Industries*, [1980] OLRB Rep. July 1001, *North York General Hospital*, [1982] OLRB Rep. Aug.

1190, *Seagram Company Ltd.*, [1982] OLRB Rep. Oct. 1571, *Cryovac, Division of W.R. Grace and Co. Ltd.*, [1983] OLRB Rep. June 886, *Smith & Stone, (1982) Inc.*, [1984] OLRB Rep. Nov. 1609, *Howard J. Howes*, [1987] OLRB Rep. Jan. 55, *George Xerri*, [1987] OLRB Rep. March 444, among others). Such strong words are applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which could be considered to be arbitrary. As the jurisprudence demonstrates, whether particular conduct will be considered to be arbitrary will depend on the circumstances.

7. The term “discriminatory” in section 69 has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143, *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779).

8. Actions or decisions motivated by hostility, ill-will or other improper considerations constitute “bad faith” within the meaning of section 69 (see, for example, *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618, *John Farrugia*, [1978] OLRB Rep. Feb. 152, *Leonard Murphy*, [1977] OLRB Rep. March 146, *Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union (sometimes cited as Walter Princessdomu)*, [1975] OLRB Rep. May 444).

9. As I have already indicated, complaints that a trade union has acted in a manner contrary to section 69 of the *Labour Relations Act* often relate to the manner in which the trade union has dealt with a grievance. While the Board does not act as an arbitrator of a grievance in complaints under section 69, facts material to the grievance will generally also inevitably be relevant to an assessment of the trade union’s conduct, and, in some cases (see *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401 for example) to an assessment of the appropriate remedy if a breach is found. Also relevant to the Board’s consideration of a fair representation complaint are the importance of the grievance(s) in question to the complaining employee(s), the implications of the grievance(s) for other bargaining unit employees and the trade union, the degree of consideration given to the matter by the trade union, and the factors, both relevant and otherwise, which the union considered in making its decision.

10. In this case, the applicant’s grievance was with respect to the termination of his employment. As such, the grievance was of the utmost importance to him, especially in today’s economy. It is the kind of case which the Board examines, as I did in this case, very carefully, and where it is possible that some relief could be obtained at arbitration, a trade union which refuses to take a discharge grievance to arbitration generally bears the onus of accounting for its decision (*Swingstage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, *Howard J. Howes, supra*).

11. The thrust of the allegations in this application as filed was that the responding trade union refused to take the applicant’s discharge grievance to arbitration because he had supported the organizing campaign of another trade union, the CAW-Canada, to supplant the responding trade union as the bargaining agent for the bargaining unit of employees of St. Catharines Hydro which included the applicant. Indeed, the application was prepared and filed by a representative of the CAW-Canada on behalf of the applicant. However, the CAW-Canada did not appear at the hearing of this matter, in any capacity. In the result, the applicant was left unrepresented. Further, the allegation that the responding trade union’s conduct was motivated by the applicant’s support for the rival CAW-Canada was not pursued at the hearing, and there was not even a hint of a suggestion that there was any basis for that allegation.

12. It was apparent that the applicant found himself in unfamiliar territory at the hearing and that he had some difficulty in marshalling his case. Persons involved in proceedings before the

Board are entitled to appear with or without counsel or other representation. The Board is sensitive to the difficulties faced by persons who appear before the Board without representation. Consequently, the Board generally, and as I did in this case, give such persons somewhat greater latitude in the manner in which they present their case. Nevertheless, as I explained to the applicant, the rules of procedures and the law applicable to proceedings before the Board are the same for all parties, whether they are represented or not. Choosing to appear unrepresented, or otherwise failing to inform itself does not relieve a party of the obligation to prove its case. Considerations of onus, procedure and the law apply equally to parties which appear unrepresented and those which are represented. A party which chooses not to retain counsel, or fails to obtain the appropriate legal advice, or otherwise fails to inform itself, must live with the consequences of that choice. Certainly, no party can expect to find itself in a more advantageous position procedurally or in law because it is unrepresented.

13. Early in the applicant's testimony it became apparent that he wished to rely on various notes or other documents which might be objected to by one or both responding parties. In an effort to expedite a complete hearing of the matter, I indicated that I intended to listen to everything which the applicant wished to say and to receive all the documents he wished to present, and to reserve on the admissibility, relevance or weight to be given to any such evidence, which questions could be addressed by the parties in argument. This procedure was acceptable to all parties and the hearing proceeded on that basis.

14. At the time of his discharge by the responding employer on August 21, 1992, the applicant was a long-term employee with some twenty-five years of seniority. Between January 18, 1989 and January 31, 1991, the applicant had compiled a disciplinary record consisting of a written warning, two one-day suspensions, a two-day suspension and a three-day suspension. Then, on May 20, 1992 the applicant was discharged. This first discharge was grieved and the grievance was settled on the basis of a memorandum of settlement dated June 1, 1992 as follows:

MEMORANDUM OF SETTLEMENT

BETWEEN:

ST. CATHARINES HYDRO-ELECTRIC COMMISSION

("the Commission")

- and -

THE INTERNATIONAL BROTHERHOOD OF

ELECTRICAL WORKERS, LOCAL 636

("the Union")

- and -

KEN HOMER

("the Grievor")

Re: Grievance of Ken Homer

#92-04, dated May 22, 1992

The parties agree to settle this matter and Ken Homer shall be reinstated, effective Monday,

June 1, 1992, without compensation into the position he previously held with the Commission on the following terms and conditions:

1. The Union and the Grievor shall withdraw grievance #92-04 dated May 22, 1992.
2. The Grievor shall receive no compensation for the period from the date of his termination to the date of his reinstatement and this period shall be deemed to be a disciplinary suspension.
3. The Union and the Grievor acknowledge that the Grievor's past employment record exhibits an attitude of disregard and disrespect for the rules of the Commission. His conduct in this regard has been the subject of previous discipline including both reprimands and suspensions.
4. In the future, the Grievor shall abide by all rules, practices, policies and procedures of the Commission including, without limiting the foregoing, the Corporate Health & Safety Policy and Procedure Manual. The Grievor shall seek clarification from his supervisor of any rule, practice, policy or procedure which he does not completely understand.
5. The Grievor shall refrain from participating in any personal business during working hours. The Grievor shall also refrain from using the commission facilities for sleeping or eating quarters, with the exception of during his regular lunch break. Finally, the Grievor shall refrain from using any of the Commission vehicles for storage or transport of personal property, unless previously authorized in writing.
6. The Grievor shall enrol in and complete the Young Drivers of Canada Driver Improvement Program on his own time prior to July 30, 1992 and at his own cost, and practice all safe driving techniques as instructed in the programme. The Commission will reimburse the Grievor for 100% of the tuition cost upon proof by the Grievor of his successful completion of the programme. Cost of The Driver Improvement Program is \$299.00.

The Young Drivers of Canada Driver Improvement Program consists of one 8 hour in class session plus three separate private in car instruction lessons lasting one and one half hours each. The regularly scheduled in class 8 hour sessions are from 8:30 a.m. to 5:00 p.m. on the following dates:

Saturday May 30, 1992  
Saturday June 13, 1992\* (Our recommended date)  
July 1992 date not confirmed as yet

There is a Driver Evaluation associated with this program. All details of the Driver Improvement Program are attached for the Grievor's perusal.

7. The Grievor shall abide by the requirements of the *Highway Traffic Act* and Regulations.
8. The Grievor shall be mentally and physically fit at all times when reporting for duty.
9. The Grievor shall conduct himself with complete honesty and integrity in all his dealings with his supervisor.
10. The Grievor shall provide proper notification of all absences including, without limiting the foregoing, pre-scheduled medical appointments, vacation and sick leave.

The parties agree that the failure on the part of the Grievor to comply with any of the above applicable terms or conditions shall constitute just cause for the Grievor's immediate discharge. This specific penalty of discharge shall not be subject to modification by an arbitrator in any arbitration proceedings.

DATED at St. Catharines this 1st day of June 1992

"D. J. Lines"  
For the Commission

"V. England"  
For the Union

"Ken Homer"  
For the Grievor - Ken Homer

A clarifying letter of understanding dated June 1, 1992 was issued at the request of the responding trade union as follows:

June 1, 1992  
File Reference H07

Mr. Harold Vance  
I.B.E.W. Local 636  
3 Forwell Road  
Kitchener, Ontario  
N2B 1W3

Re Grievance 92-04 (Ken Homer)

As promised, a letter of understanding on the last clause of the conditions for the return to work of Ken Homer.

The clause does not deny Ken Homer the right to grieve dismissal. This is borne out by the works "Grievor" and "Arbitrator". The clause restricts the power of the arbitrator in that, if the arbitrator finds for the employer the penalty is dismissal, however we would be ill advised to bring any dismissal action against Ken, that is of a frivolous nature, knowing that an arbitrator may find for the grievor under such circumstances.

I trust that the foregoing provides you with the reassurance that you are seeking.

Yours truly,

"David J. Lines, P.Eng., M.B.A.  
GENERAL MANAGER & SECRETARY

15. The applicant does not complain, in this application, of the manner in which he was represented by the responding trade union with respect to any of this previous discipline, including the first discharge. Although there was some debate about the circumstances surrounding the June 1, 1992 memorandum of settlement, I was satisfied that the applicant had agreed to and signed it voluntarily, and with full knowledge of what he was getting and giving up. The applicant specifically conceded that he chose to sign the memorandum of settlement which he understood contained special rules for him so that he could return to work immediately rather than waiting four to five months for his grievance to be arbitrated, perhaps unsuccessfully.

16. Less than three months later, the applicant was discharged for a second time. In a three-page discharge letter to the applicant dated August 21, 1992, the employer recited numerous alleged specific violations of the June 1, 1992 memorandum of settlement and stated that:

• • •

Since your reinstatement on June 1st, 1992, you have exhibited behaviour which is unacceptable and is not conducive with that of a person wishing to conform with the Rules, Regulations, Policies and Procedures of St. Catharines Hydro-Electric Commission. St. Catharines Hydro has

given you every opportunity to be part of this organization but you have given us no alternative but to discharge you from our employment effective 4:30 p.m. today.

...

17. The responding trade union grieved this second discharge and processed the grievance through the grievance procedure in the collective agreement between the responding parties. The grievance was delivered on August 24, 1992 and the requisite grievance meeting was held on August 31, 1992. The applicant met with representatives of the responding trade union to discuss the matter prior to going in to the grievance meeting with representatives of St. Catharines Hydro. While the applicant complained that he would have liked to have had more time to discuss the matter before going in to the grievance meeting with St. Catharines Hydro, there is no indication that he was in any way prejudiced by this. Further, it is clear that he had a full opportunity to state his case at the grievance meeting and that he, and the responding trade union on his behalf, did so. There is nothing to indicate that the responding trade union's representation of the applicant prior to or at the grievance meeting was anything other than proper (indeed, the applicant made no complaint in that specific respect).

18. St. Catharines Hydro denied the grievance. Its decision is recorded in a letter dated September 4, 1992 which is referred to on the grievance form in a notation dated September 3, 1992.

19. On September 18, 1992, Harold Vance, the responding trade union's Business Representative, telephoned the applicant. In a discussion with the applicant and his wife, Vance advised them that the trade union, upon considering the grievance and legal advice it had received, had decided that the grievance could not succeed at arbitration and that it would not be pursuing the grievance further. Subsequently, Vance advised St. Catharines Hydro of the union's decision by letter dated September 22, 1992.

20. The applicant sought to rely on a letter dated May 3, 1993 from D. J. Lines, St. Catharines Hydro's General Manager and Secretary at the time of the second discharge and grievance, and the person who decided to deny the grievance. This letter, which referred to a meeting the applicant testified he had with Lines on September 19, 1992, after the responding trade union had advised him that it would not be pursuing his grievance to arbitration, reads as follows:

Further to your recent enquiry regarding a meeting that we had shortly after your dismissal from St. Catharines Hydro, I must inform you that I cannot recall specific details of the conversation. However, I do recall being surprised, at that time, that the union (IBEW Local 636) was not prepared to file a grievance on your dismissal, notwithstanding the letter that you had previously signed. I felt that management's case was marginal and I was concerned that an arbitrator may have reinstated you, regardless of the letter.

I also recall thinking that in the event of reinstatement, management would have to find you a position which would afford you closer supervision. I believe that I did also consider the possibility of a "buy out package", although my thoughts were really directed to contingency plans for your reinstatement and your continued employment with the utility, following such an event by an arbitrator.

I trust that the foregoing is of interest to you.

I considered this letter to be of dubious probative value. Lines was himself fired by the employer before he wrote the letter, he was not present and available at the hearing to testify, and the applicant himself conceded that Lines was probably only trying to make him feel better.

21. Why the applicant had that sense may be explained by his concession at the hearing of

this matter that most of the allegations in the August 21, 1992 discharge letter were true. While he tried to explain or rationalize what had happened, the applicant conceded that he was one hour late for work on each of June 9, July 16, and July 17, 1992, that he was twice warned for this lateness, that he offered no explanation for an absence from work during the morning of August 11, 1992, that he took and did not record in the required manner a break on June 8, 1992, that he was discovered to have taken a shower during regular working hours on June 17, 1992, that medical appointments had not been accurately recorded, that he had failed to complete the Young Drivers of Canada Driver Improvement Program as specified in the June 1, 1992 memorandum of settlement, and had then lied about it, and that he attended to personal affairs (laundry) during regular working hours on August 17, 1992.

22. Any one of these occurrences could have constituted just cause for discharge pursuant to the terms of the June 1, 1992 memorandum of settlement. Even if St. Catharines Hydro could have been precluded from relying on the events prior to August, 1992 on the basis that it had failed to act on them in a timely manner, it was clearly open to St. Catharines Hydro to discharge the applicant for his transgressions in August, 1992. Since the parties have specifically agreed that the penalty of discharge would not be subject to modification in the arbitration proceedings, no explanation the applicant could offer could have had any effect on the result at arbitration. (I note that all the material events occurred prior to the extensive amendments to the *Labour Relations Act* which came into force on January 1, 1993, including section 45(9) of the Act.)

23. The applicant also sought to rely on the letter from Mike Sullivan as follows:

I have been asked if I thought there was an option available to a Union member that has a grievance go through the normal grievance procedure but is unsatisfied with the answers received from the Local Union on the matter.

It has been my experience, having served on the Executive Board of L.U. 636 I.B.E.W., that the Union member has the right to raise this matter with the Local's Executive Board and that the Executive Board would consider the matter.

24. Sullivan was not present and available to testify at the hearing either. Further, I saw nothing in the International Brotherhood of Electrical Workers' International Constitution which supports his conclusion, including the provision in section 9 of Article XVIII referred to by the applicant.

25. Finally, the applicant referred to Article 6 of the collective agreement between the responding parties and argued that the employer had failed to respond to the grievance in a timely manner and that his grievance should therefore have succeeded by default. In my view, the applicant's interpretation of the collective agreement was neither plausible nor supported by the evidence. The grievance meeting was clearly held within the time specified, and the employer clearly made its decision on the grievance within the specified time. The fact that the employer's decision may not have been communicated to the trade union at the same time as it made its decision is irrelevant, particularly since there was no inordinate delay.

26. In the result, there is nothing before the Board which suggested that the responding trade union either did not have or did not consider all relevant information, or that it considered any irrelevant matters, in deciding not to take the applicant's second discharge grievance to arbitration. Nor was there even a suggestion that the union had acted in a manner which was discriminatory or in bad faith. Nothing the trade union had done or not done required any further examination or explanation. In short, I was satisfied that on his own evidence, the applicant had presented no basis upon which this complaint could succeed.

27. I therefore so ruled and dismissed this application as aforesaid. Further, and as I also observed in my oral decision at the hearing, there would have been no point to taking the applicant's second discharge grievance to arbitration in any event because there was no chance it could succeed. In my view, the responding trade union's decision to not proceed to arbitration was correct.

28. The responding trade union asked that the Board order the CAW-Canada to pay its costs of this proceeding, essentially on the basis that it had encouraged this application which the Board had found to be without merit. Even if the Board has the general jurisdiction to award such costs, I am not satisfied that the Board can award costs against an entity which is not a party. The request is therefore denied.

29. I was not without sympathy for the applicant in this case and the position he finds himself in, particularly in this economy. However, the applicant is not where he is as a result of anything which either of the responding parties have done.

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**0723-92-R Local 47 Sheet Metal Workers' International Association, Applicant v. Marc Mechanical Limited, Responding Party**

**Adjournment - Employee Reference - Practice and Procedure - Board cancelling oral hearing scheduled to receive representations with respect to Officer's Report - Parties directed to make written representations - Board to make appropriate determinations on basis of evidence recorded in Officer's Report and parties' representations**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

**DECISION OF THE BOARD; May 14, 1993**

Having reviewed the material filed in this matter and the issue between the parties, it appears to the Board that their representations with respect to the Officer's Report can appropriately be made and received, in writing, and that a formal hearing for this purpose is unnecessary. Accordingly, the hearing now scheduled for May 19, 1993 is cancelled and the applicant is directed to make its representations (with a copy to the responding party), in writing, within 14 days of the date hereof. The responding party will then have 14 days to respond; and the applicant will have a further 7 days to make any final reply. The Board will then make such determinations as appear to be appropriate on the basis of the evidence recorded in the Officer's Report and the parties' representations.

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**3238-92-JD** Ontario Sheet Metal Workers' & Roofers' Conference; Sheet Metal Workers' International Association, Local 473, Applicants v. **Ontario Hydro**; Electrical Power Systems Construction Association; Labourers' International Union of North America, Local 1059, Responding Parties

**Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Reconsideration - Timeliness - Board making final order in jurisdictional dispute complaint following consultation with parties - Labourer's union requesting reconsideration and arguing that Board improperly refused to hear certain evidence, that there was no evidence to support certain findings, and that Board misinterpreted material before it - Board explaining its approach to requests for reconsideration given need for finality in its adjudication - Board also explaining new "consultation" procedure for resolving jurisdictional dispute complaints - Board finding no reason to reconsider its disposition of the complaint - EPSCA's separate reconsideration request dismissed as untimely under Rule 85 and on its merits**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**DECISION OF THE BOARD;** May 12, 1993

1. This application concerned a complaint concerning an assignment of work. Pursuant to section 93 of the *Labour Relations Act*, the Board held a consultation with respect to the application on March 1, 1993. Upon considering the written representations and other materials filed by the parties, and their oral representations during the consultation, the Board disposed of the matter in an oral ruling, and issued a written decision in that respect on March 8, 1993 see *Ontario Hydro*, [1993] OLRB Rep. Mar. 227. The Board's ruling was in favour of the applicants Ontario Sheet Metal Workers' & Roofers' Conference and the Sheet Metal Workers' International Association, Local 473 (the "Sheet Metal Workers").

2. By letter dated April 20, 1993, the Labourers' International Union of North America, Local 1059 (the "Labourers") requested reconsideration of the Board's March 8, 1993 written decision (and presumably also of the Board's March 1, 1993 oral decision). Subsequently, on April 29, 1993, the Labourers refiled its request for reconsideration on Form A-47, the appropriate form in that respect. The Labourers requested that the Board entertain its request "... notwithstanding its late filing due solely to a lack of awareness of the Board's new requirements in this regard."

3. On April 28, 1993, the Electrical Power Systems Construction Association (the "EPSCA") also requested reconsideration. The EPSCA acknowledged that its request was late but requested that the Board exercise its discretion under either Rule 85 or Rule 22 to relieve against the late filing. The EPSCA has offered no explanation for its delay.

4. Rules 3, 4, 6, 17, 22, 83, 84, and 85 of the Board's Rules of Procedure provide that:

...

3. Where these Rules refer to a period of time, that period of time does not include Saturdays, Sundays and statutory holidays.

4. The Board may set the forms to be used in its cases, and may change those forms from time to time. Copies of the forms may be obtained from the Board's office in Toronto.

...

6. All filings with the Board must be made in the proper form, if any, and in the way required by these Rules.

• • •

17. An application or response may not be processed if it does not comply with these Rules.

• • •

22. The Board may relieve against the strict application of these Rules where it considers it advisable.

• • •

83. A request for reconsideration under subsection 108(1) of the Act must include complete written representations in support of the request.

84. Where a party is directed to file a response to the request, it must include complete written representations in support of its position.

85. No request for reconsideration will be considered where it is filed thirty (30) or more days after the date of the Board's decision, except with the permission of the Board.

5. Ignorance of the Board's Rules is no excuse, especially for a party and counsel who are often before the Board. However, the only real difference between the Labourers' April 20 and April 29, 1993 requests for reconsideration is that the latter was made on Form A-47 and the former was not. We find it appropriate to treat the Labourers' request for reconsideration as having been made on April 20, 1993, notwithstanding that the correct form was not filed until nine days later. Because of Rule 3, the Labourers' request is therefore a timely one.

6. Section 108(1) of the *Labour Relations Act* provides that:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Under section 108(1), the Board has a broad discretion to reconsider any decision. That discretion must be exercised judicially. Both section 108(1) and legal and labour relations considerations require the Board to operate from the premise that a Board decision is final and conclusive for all purposes, unless there is a good reason to change it. Consequently, the Board will not usually reconsider a decision unless an obvious error is identified; or a request for reconsideration raises important policy issues which have not received adequate attention or consideration; or the party requesting reconsideration proposes to present new evidence which it could not, with the exercise of due diligence, have obtained and presented previously, and which new evidence would, if accepted, have a material impact on the decision in question; or that a party seeks to make representations which it has had no previous opportunity to make.

7. In many ways, the Board's approach to reconsideration mirrors the manner in which the Board applies the doctrine of *res judicata* (or a principle like it). *Res judicata* is a form of estoppel which, in its modern form, is based on two broad public policy principles:

(a) that all litigation should have an end; and

- (b) no party should be forced to litigate the same matter more than once.

The doctrine of *res judicata* operates to preclude a party or its privies from re-litigating issues (other than through an available appellate process) which have been resolved by a final decision on the merits by a court or tribunal with the jurisdiction to decide the matter. In essence, a specific final determination of the right, question, or fact, is conclusive evidence thereof in any subsequent proceeding between the same parties or their privies (or, if the decision is in rem, in *any* subsequent proceeding) so long as the decision stands, unless the party otherwise bound by the decision alleges the fact which would, if proved, have a material effect on the decision and the evidence required to establish that fact could not, by the exercise of reasonable diligence, have been previously discovered (See *Angle v. Minister of National Revenue*, [1975] SCR 248; *Town of Grandview v. Doering*, (1975) 61 DLR (3d) 455 (Supreme Court of Canada)).

8. The Labourers have requested that the Board hold a hearing with respect to its request for reconsideration. It suggests no reason why one is necessary and it is not apparent to us why one is required. A request for reconsideration is not intended to provide a second chance for a party to make its case. Such a request does not necessarily require the Board to hold a hearing either on the merits of the matter decided, or with respect to the request itself. In our view, there is nothing in either request for reconsideration herein which merits a hearing.

9. For years prior to January 1, 1993, the construction labour relations community cried out for a more responsive and expeditious jurisdictional dispute process before the Board. On January 1, 1993 the present section 93 of the *Labour Relations Act* came into effect. This provision is a response to the community's call and contemplates a much more expeditious procedure. The Board's new Rules of Procedure with respect to jurisdictional dispute (Rule 72-76) complement the new section 93 of the Act and also contemplate a radically expedited procedure. The Act and the Rules both contemplate that a complaint concerning work assignment may be disposed of without an oral hearing. The Act specifically gives the Board a discretion with respect to whether or not it will entertain a jurisdictional complaint, and also with respect to how the Board proceeds with a complaint it decides to entertain (section 93(1.1)). The Act goes on to provide that the Board may make any interim or final order it considers appropriate after holding a consultation *or* a hearing (section 93(1.2)).

10. In this case, the Board found it appropriate to schedule a consultation, a proceeding which is something less than a hearing in the traditional sense. Nevertheless, a consultation is an opportunity, perhaps the only opportunity, for the parties to a jurisdictional dispute complaint to address the Board with respect to the matter. The rules of natural justice do not apply to such a proceeding in any traditional sense. However, the parties are afforded the opportunity to refer to the extensive materials which they are required to file in such cases, and to make representations with respect to how the Board should proceed (including whether the Board should hear evidence or otherwise hold a hearing on any matter or issue) or dispose of the complaint.

11. The Labourers advance what are essentially three arguments in support of its request for reconsideration: first, that the Board improperly refused to hear evidence which the Labourers wish to lead; second, that there was nothing before the Board to support at least some of the Board's conclusions; third, that the Board either misinterpreted or misapplied the material or "evidence" before it.

12. The jurisdictional dispute in this case involves some forty-eight worker hours. The parties filed extensive Briefs of submissions and documents, including literally hundreds of pages of material relating to the employer and area practice upon which they wish to rely. The Board

reviewed and considered all of this material, together with the representations of the parties at the consultation on March 1, 1993, including the material and representations specifically referred to in the Labourers' request for reconsideration. Some of the material was unrelated to the dispute before the Board and was considered irrelevant. The relevant material was weighed in accordance with what the Board considered to be its probative value.

13. In that respect, it is true, as the Labourers suggest, that on August 15, 1984 its members were assigned to "rip out" non-reusable "building internals", and that this assignment formed a basis for a May 25, 1989 assignment of removal of scrap of building internals. We note that these assignments related to interior work which did not include sheet metal siding. Further, the same May 25, 1989 assignment (which was made after Ontario Hydro began to employ sheet metal workers directly - see *Electrical Power Systems Construction Association*, [1991] OLRB Rep. Feb. 185) shows that the "removal, replacement and repair of all flashing and sheet metal siding", which suggests that the "removal" was for scrap, was assigned to members of the Sheet Metal Workers. Past practice with respect to the removal of building internals was not relevant to the question of how the work in dispute herein; namely, the removal for scrap of exterior metal siding, is properly assigned. It was relevant to the Board's assessment of the Ontario Hydro policy with respect to the assignment of removal work referred to in paragraph 10 of the March 8, 1993 written decision.

14. With respect to the "field assignment" materials filed, the Board considered the Labourers' assertions in that respect. There was no need to hear evidence in that regard because the Board accepted the assertions as true for purposes of the consultation. (We also observe that the Board's experience with testimony with respect to such assignment is that it takes days to hear but consists largely of a regurgitation of the assertions themselves.)

15. As paragraph 11 of the Board's March 8, 1993 written decision indicates, the Board considered the field assignment and materials but gave them less weight than assignments of work made through a mark-up process. This is not the result of an application of any "... rule derived from other proceedings involving different parties ...". We are unaware that any such "rule" has been articulated. On the other hand, as an expert labour relations tribunal we are also aware of the nature of field assignments and the manner in which they are made; namely, in the field, quickly and without notice or consultation with other trade unions. The Labourers now assert that there are unique circumstances in this case which justify giving greater weight to relevant field assignments in this case. To the extent that these unique circumstances are that the field assignments "flowed from and confirm previously marked-up assignments of similar work" which were not challenged by the Sheet Metal Workers (and which are the only "unique circumstances" identified by the Labourers), we considered them in making our assessment. Further, we note that the Sheet Metal Workers also submitted examples of field assignments which favoured their claim.

16. Just as the Board considered the Labourers' assertions, the Board considered those made by the Sheet Metal Workers, and by Ontario Hydro and the EPSCA, including the apparent conflicts or inconsistencies in that respect. With respect, there is no merit to the Labourers' assertion that the Board's decision herein was based on anything other than the material and submissions of the parties, and what could reasonably be inferred from them.

17. Certainly, the materials filed suggest that the Ontario Hydro removal policy has not been applied to the for scrap and building internals, or, perhaps, of block walls or concrete, and that the Labourers have been assigned such work. But that was not the work in dispute herein. Nor did the practice materials exclusively favour the Sheet Metal Workers' claim. As is common in jurisdictional disputes which come before the Board, the practice materials point in both directions.

What is clear is that the removal of metal siding for scrap to the first drop point has been previously assigned to members of the Sheet Metal Workers. Even the Labourers request for reconsideration concedes that.

18. The Labourers submit that:

"The Board erred by finding in its decision that the "removal", "replacing" and "installation" assignments were of no real assistance to the Board while relying on evidence involving removal, replacing and installation assignments in support of its finding that the area practice favoured the Sheet Metal Workers. The only assignments of work "like" the work in dispute contained in the Sheet Metal Workers' filings involved replacement, repair or reuse."

We have some difficulty in understanding this assertion. However, the Board did find the "removal and replace" (not "removal", "replacing") and "installation" practice materials to be of little assistance since this was a "removal for scrap" assignment and the materials filed by all parties, and their representations at the consultation, indicated that there is a distinction between the two. We note that to the extent that "removal and replace" and "installation" practice is relevant it would clearly favour the claim of the Sheet Metal Workers.

19. The Labourers also complained that there was nothing before the Board which would suggest who installed the metal siding which was the subject of the removal assignment herein. More specifically, say the Labourers, there was no evidence that members of the Sheet Metal Workers had installed it. This is the first time that there has been any suggestion that members of the Sheet Metal Workers did not perform the installation. The consultation proceeded on the (unstated) assumption that they had. No one has previously suggested that the Ontario Hydro policy referred to by the Board did not apply because the Sheet Metal Workers was not the installing trade. Further, the installation of such siding is the work of Sheet Metal Workers, and both on that basis and the materials before the Board in this case, it seems highly unlikely that sheet metal workers did not install this siding. If they did not, who did? It certainly was not a labourer.

20. Finally, the Labourers assert that "separating the unfastening and lowering to the first drop point portion of the work by requiring that it be performed by other persons than those who perform the work of carrying the material to the disposal point, is self-evidently an inefficient and uneconomical method of carrying out the work." With respect, there is nothing self-evident about it. The fact that there was a "first drop point" suggests that there are at least two steps to the removal procedure and the first drop point provides a ready line of demarcation in that respect. This is a common way to draw a line between two or more trade jurisdictions.

21. We are satisfied that the Labourers' request for reconsideration should be dismissed.

22. The EPSCA's request for reconsideration is, as we indicated above, late. In our view, the EPSCA has offered no cogent reason why the 30-day time limit in Rule 85 should not be applied. The mere fact that the request is brief is no reason. Nor is the fact that the Labourers filed a request for reconsideration which the Board considers timely. It is generally inappropriate to allow one party to piggy-back upon another party's request, particularly when the two are completely unrelated. No explanation has been offered for the late filing and we do not find it appropriate to relieve against the time limits in the rules.

23. In any event, the EPSCA's request is that the Board amend its order by deleting the reference to the EPSCA in paragraphs 2 and 16 of the March 8, 1993 written decision on the basis that the EPSCA does not make work assignments. This position could have and should have been advanced in the EPSCA's Brief and at the consultation. It was not. The letter filed by the EPSCA in support of its request for reconsideration is dated February 26, 1993, only one day after the

EPSCA and Ontario Hydro joint response to the application is dated, and prior to the consultation held herein. Clearly, it, or the point made in it, was available for use in these proceedings.

24. Further, both the Briefs filed by the EPSCA and Ontario Hydro, and the materials before the Board in this matter suggest that the EPSCA is directly involved in the mark-up process which results in assignment of work.

25. In our view, the EPSCA's request for reconsideration should be dismissed both because it is late and because there is no merit to it.

26. In considering these requests for reconsideration, the Board has once again exhaustively reviewed the materials filed in this matter. In the result, the Board is satisfied that there is no reason to amend, vary or otherwise reconsider its disposition of this application, either as requested or otherwise. The requests for reconsideration are therefore dismissed.

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**1286-92-JD The Regional Municipality of Sudbury Pioneer Manor - Home for the Aged, Applicant v. Ontario Nurses' Association and Canadian Union of Public Employees, Local 148, Responding Parties**

**Jurisdictional Dispute - Nurses' union complaining about assignment of work, including administration of medications and other nursing duties, to RNAs - Employer directed to restore assignment of disputed work to those covered by nurses' collective agreement**

**BEFORE:** Robert D. Howe, Vice-Chair, and Board Members G. O. Shamanski and H. Peacock.

**APPEARANCES:** Walter Thornton, John Luszka and M. McInnis for the applicant; Elizabeth McIntyre, Bertha Kovacs, Ralph Mills and Carol Fleming for Ontario Nurses' Association; Nancy Rosenberg and Dennis Burke for Canadian Union of Public Employees.

**DECISION OF THE BOARD;** May 4, 1993

1. This is a complaint concerning work assignment under section 93 of the *Labour Relations Act*.

2. The primary work in dispute consists of the administration of various medications to the residents of Pioneer Manor, a home for the aged which opened in 1953 and has been operated by the Regional Municipality of Sudbury (the "Employer") since 1973. (For ease of reference, Pioneer Manor will also be referred to as the "Home" in this decision.) Certain other nursing duties (including providing guidance to Practical Nurses, reporting to incoming shifts, and engaging in some forms of data collection, documentation, and administration) are also in dispute. However, since the submissions of the parties focused primarily upon the administration of medications, that will also be the focus of this decision.

3. During the period from 1953 to 1974, the function of administering medications at the Home was performed by Practical Nurses who generally had no formal training and were trained on the premises. That practice ceased in 1974 when the Director of the Ministry of Community and Social Services' Senior Citizens' Bureau issued new guidelines concerning the administration of

drugs, which included a requirement that they be administered to a resident “only by a physician, dentist, registered nurse or, where the Director of the Bureau approves, a registered nursing assistant.” After those guidelines were issued, the administration of medications was assigned exclusively to Registered Nurses (“RNs”) at Pioneer Manor. That practice remained in place until 1991, when the Employer decided to assign to Registered Nursing Assistants (“RNAs”) the administration of most medications. Although no RNs have been laid off by the Employer as a result of the reassignment of that work (or any of the other work in dispute) from RNs to RNAs, the number of RNs employed at the Home has been reduced through attrition, and it is the Employer’s intention to continue to reduce its RN complement by that means.

4. Canadian Union of Public Employees, Local 148 (“CUPE”) has held bargaining rights since 1963 for all of the employees at the Home except specified exclusions such as Professional Medical Staff, Charge Nurses, Assistant Department Heads, Registered and Graduate Nurses, and office staff. It is common ground among the parties that any RNAs employed by the applicant fall within the scope of CUPE’s bargaining rights.

5. The Ontario Nurses’ Association (“ONA”) holds bargaining rights for all Registered and Graduate Nurses employed in a nursing capacity by the Home, with the exception of the Director of Nursing Services and the Assistant Director of Nursing Services. Both its full-time and part-time collective agreements with the Home contain the following provision, which has remained unchanged since being awarded by an interest arbitration board chaired by Gail Brent (the “Brent Board”) in 1980:

- 2.02 In order to protect the standard of nursing care, the Employer agrees that no one outside the above mentioned bargaining unit shall perform the work normally performed by members of this bargaining unit, except for:
- (a) the purpose of instruction or experimentation; or
  - (b) in the event of an emergency; or
  - (c) work normally performed by employees outside the bargaining unit.

6. In awarding that provision, Arbitrator Brent wrote as follows:

The board considers that the above clause represents a reasonable compromise between the positions taken by the parties which protects the interests of the parties as expressed to the board.

7. The position taken by ONA in its written submissions to the Brent Board included the following:

ARTICLE 2.02 - RECOGNITION - (Full-Time and Part-Time)

ASSOCIATION PROPOSAL

- 2.02 In order to protect the standard of nursing care the Employer agrees that no one outside the above mentioned bargaining unit shall perform the work normally performed by members of this bargaining unit except for the purpose of instruction or experimentation or in event of an emergency situation.

EMPLOYER PROPOSAL

- 2.02 The parties hereto, agree that for the term of this Agreement, there will be no restriction on Contracting Out by the Employer, of their work or services of a kind now performed by employees herein represented; provided, however, that no Permanent

Employee of the Employer, who was such on March 6th, 1979, shall, as a result of such Contracting Out, thereby lose employment.

#### ARGUMENT

The above proposal of the Association is one which prohibits those outside the bargaining unit from performing bargaining unit work. It is clear that in the absence of an express provision in the Collective Agreements an Employer may assign bargaining unit work to Supervisors or other employees outside the bargaining unit, or contract out work. The Employer's proposal would give them almost unfettered rights to contract out work and to assign work out of the bargaining unit. In our view, such an occurrence would be undesirable and threatening to the job security of those within the bargaining unit. The provisions of a Collective Agreement can be made null and void if the Employer can, in effect, remove work from the bargaining unit at will.

Our proposal is also an attempt to protect the standard of nursing care in the Manor by assuring that personnel with an ongoing relationship with the Employer (i.e. - members of the bargaining unit) perform the nursing functions necessary at the Manor. This will provide consistency of patient care as well as the benefits of being able to discuss problems on an ongoing basis and familiarity of personnel with each other.

It would also ensure that the bargaining rights of O.N.A. are protected in that nursing functions will be done only by personnel covered by the Collective Agreement except in exceptional circumstances. The Employer's proposal would not in fact, protect the bargaining rights of our members. The only proviso which they have placed in their clause is that no permanent employee, who was such on March 6th, 1979, shall lose her employment as a result. Presumably, they would then have the right to contract out work and terminate employees as long as those employees were not hired before March 6th, 1979. A second concern is that present employees could have their hours of work reduced as a result of contracting out without being actually terminated. This concern is especially great with respect to the Collective Agreement covering part-time nurses. Any such employee could have her job security seriously threatened by the Employer contracting out even though she would officially remain an employee.

Trends in the Homes Sector in general in this regard are the basis for our concern that this clause as we have proposed be included in the Collective Agreement. There has been a tendency in many Homes for the Aged to employ fewer registered nurses and to place less trained personnel in positions of greater responsibility. Such a practice has led to a decrease in the standard of nursing care and has also placed those registered nurses remaining in the bargaining unit in a position of greater jeopardy. They often become liable for the actions of registered nursing assistants and others whom they are, in effect, unable to supervise directly.

This is an issue of great importance that goes to the heart of the question of job security, the integrity of the bargaining unit, and the standard of nursing care which the Manor provides. We want to ensure that there is no avenue open for the Employer to embark on a course of action which may have the effect of nullifying the force and effect of the Collective Agreement.

• • • •

8. The position taken by the Employer in respect of Article 2.02 in its written submissions to the Brent Board was:

#### Article # 2 - Recognition

2:02 The Association Proposal would negate all routine duties currently being provided on a daily basis by the Director of Nursing; i.e. Residents walking into or by her office for medica-

tion, first aid treatments, liniment applications, routine resident counselling and overload nursing.

In addition, such a clause would prohibit the contracting out of any nursing care or service. The granting of such a clause would cement a monopoly of nursing care and services to the Ontario Nurses Association.

A public service body, being the Regional Municipality of Sudbury, and being democratically elected, must retain the right to explore and seek alternative sources of supply that maintain or improve its standards and provide more economical costs. Therefore, the Employer proposes in its counter-proposal to the Association exercising such rights *however* providing job security to Permanent class employees covered by this Agreement, who were such on March 6th, 1979. This Proposal is similar to that provided C.U.P.E. employees. Non-Union employees do not have such a job security clause. The Association Proposal is not contained in any of their collective agreements within the boundaries of the Regional Municipality of Sudbury.

9. The acceptable scope of nursing practices of RNs and RNAs is guided by the College of Nurses of Ontario (CNO). In particular, the CNO's Standards of Nursing Practice for Registered Nurses and Registered Nursing Assistants (the "Standards") identify the minimum expectations for providing safe, effective, and ethical nursing care. Prior to 1984, the administration of medications (of certain types and by certain routes) was an "A level" basic skill for RNAs, but an RNA could also be qualified to administer medications in additional ways as an "added skill". After 1984 the administration of medications ceased to be a basic skill for RNAs and became an added skill, which could be exercised only by RNAs who had completed an approved pharmacology course and who worked in a setting in which their employer provided adequate instruction and supervision. Under the CNO's current Standards and its Medication Administration Guidelines, an RNA who has obtained a Drug Administration Certificate by completing the post-basic pharmacology course which was developed in 1985 satisfies the basic requirements for competence to administer medications. Under the current Standards, qualified RNAs can administer medications "topically, through natural body orifices, through tubes, and by intracutaneous and subcutaneous injection." However, unlike RNs, they cannot administer medications through intramuscular injections or "intravenously, above the drip chamber".

10. Over the years the Employer has hired as Practical Nurses a number of individuals with RNA qualifications, including some having a Drug Administration Certificate. In the Fall of 1991 the Employer decided that it would be desirable to utilize some of those persons to administer medications and perform some of the other duties previously performed by its RNs. That decision was motivated by financial considerations and by a concomitant desire to make use of employees who, although not employed as RNAs, were qualified as RNAs with a Drug Administration Certificate.

11. As of November 1, 1991, the Home's Practical Nurses earned between \$14.22 and \$14.62 per hour. The Employer anticipates that its negotiations with CUPE will yield a start rate of approximately \$14.75 per hour for RNAs, with a top hourly rate of approximately \$16.50 after three years' service. As of April 1, 1989, the Home's RNs earned between \$16.17 and \$19.53 per hour. However, in its most recent round of contract discussions and interest arbitration proceedings with the Employer, ONA has proposed (maximum) rates of \$24.62 as of October 1, 1991, and \$26.67 as of April 1, 1992, in order to bring RNs employed by the applicant into a position of parity with hospital rates. The Employer, on the other hand, has proposed wage increases of approximately 6% per year, which would produce a top rate of \$21.99 as of October 1, 1991. By gradually reducing through attrition the number of RNs it employs and replacing them with RNAs, the Employer hopes to be in a financial position to meet the needs of its ever increasing number of residents who, as a result of physical and/or mental dysfunction, require extended care. (Residents

having little physical or mental dysfunction require only “residential care”, as their mobility enables them to eat their meals in the Home’s dining room and make their own beds.)

12. In order to effectuate its plan to utilize RNAs, the Employer notified CUPE in October of 1991 that it would soon be introducing at Pioneer Manor a new position of “Registered Nursing Assistant, with Medication Certificate” (and requested a meeting with CUPE to determine the appropriate wage rate for that new position). Since that time, the Employer has posted and filled several of those positions, instead of posting RN positions vacated by resignation, physical incapacity, and death. The Employer’s actions have given rise to a number of grievances by ONA and members of the ONA bargaining unit. A motion by ONA that the Board defer consideration of this complaint pending arbitration of those grievances was dismissed by another panel of the Board in an oral ruling rendered on November 6, 1992, for the reasons set forth in a decision dated November 13, 1992 (see *Pioneer Manor - Home for the Aged*, [1992] OLRB Rep. Nov. 1219).

13. As indicated below, it is the Employer’s contention that Article 2.02 does not preclude it from assigning the work in dispute to RNAs. However, in June of 1992, approximately a year after conciliation in respect of its latest round of contract negotiations with ONA, the Employer submitted the following additional proposal to ONA “for clarification purposes”:

ARTICLE 2

RECOGNITION

2:02

The following shall be entered as additional language under this article:

“Where the standard of nursing care is not affected, then the provisions of this article do not apply.”

Further, the Employer proposes the following to appear in the Interest Arbitration Award or in a Letter of Commitment:

“It shall be understood that no employee in the bargaining unit shall lose employment, be demoted [sic] or suffer a loss of basic wages or welfare benefits as a result of persons outside the bargaining unit performing the work normally performed by members of the bargaining unit.”

ONA’s response to that proposal was that it was “not prepared to entertain any additional proposals at [that] time.” The Employer subsequently informed ONA that although it was unfortunate that ONA would not meet with it to discuss the proposal, the Employer would nevertheless be including it in its interest arbitration submission. ONA’s response was that the Employer’s “suggestion of including [the proposal] in the upcoming interest arbitration would be completely inappropriate.”

14. At a consultation conducted by the present panel of the Board on March 25, March 31, and April 1, 1993 in respect of this complaint, the parties agreed that area (and industry) practice is a neutral factor. After counsel for the Employer admitted that all other things being equal, the Employer preference is to assign the work in dispute to RNs because of their broader base of skills and knowledge, the parties further agreed to argue the matter on the basis of it being assumed for purposes of argument, without deciding, that RNAs are capable of performing the work in question in a competent manner. (That agreement was reached on the understanding that if the Board found itself unable to decide the complaint without hearing evidence regarding RNAs’ capability to perform the work in question, that evidence would be heard on the other continuation dates previously scheduled.)

15. In assessing the merits of jurisdictional disputes, the Board has traditionally considered a number of criteria, including the following:

- (a) collective bargaining relationships,
- (b) skill and training,
- (c) safety,
- (d) economy and efficiency,
- (e) employer past practice,
- (f) area or industry practice,
- (g) employer preference.

(See, for example, *Newmarch Inc.*, [1990] OLRB Rep. Feb. 179; *Quebec and Ontario Paper Company Ltd.*, [1989] OLRB Rep. July 796; *Premier Pipelines Ltd.*, [1988] OLRB Rep. Oct. 1068; *Spruce Falls Power & Paper Company Limited*, [1988] OLRB Rep. July 708; *Southam Murray Printing*, [1984] OLRB Rep. June 868; *Southam Printing Limited*, [1984] OLRB Rep. Jan. 117; *Silverwood Dairies Limited*, [1981] OLRB Rep. Nov. 1624; *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565; *Boise Cascade Canada Ltd.*, [1979] OLRB Rep. Sept. 850; and *Anchor Shoring Ltd.*, [1974] OLRB Rep. Aug. 528.

16. As indicated above, the parties have agreed that area (and industry) practice is a neutral factor in the instant case. The Employer's preference is somewhat equivocal and not particularly helpful in and of itself. As a result of considerations of economy and efficiency, the Employer would prefer to assign the work in dispute to RNAs. However, as noted above, all other things being equal, the Employer would prefer to assign the work in dispute to RNs because of their broader base of knowledge and skills.

17. As further indicated above, this matter has been argued on the basis that, at this stage of the proceedings, the Board will assume for purposes of argument, without deciding, that RNAs are capable of performing the work in question in a competent manner. However, this is also indisputably true of RNs. Thus, the criteria of skill, training, and safety are of little assistance to the Board in this context.

18. Economy and efficiency are also of limited assistance in resolving this dispute. Although the applicable RNA wage rates are lower than those of RNs, the Board has indicated on a number of occasions that "a trade union can't buy jurisdiction" by being prepared to do the work for a lower wage rate than the competing union. (See, for example, *Ontario Hydro*, [1983] OLRB Rep. June 932, and *Anchor Shoring Limited*, *supra*.) The Employer's contention that it will be in a position to provide better care to its residents if it can use the money saved by non-replacement of RN positions (eliminated through attrition) to hire a greater number of RNAs is, in essence, simply an alternate phrasing of that approach which has been rejected by the Board.

19. The matters generally considered by the Board under "economy and efficiency" are such factors as the overall flow of work and output per hour by the competing classifications or trades. Viewed by this perspective, "economy and efficiency" provide some support for the Employer's case, as the flexibility of being able to assign the work in question not only to RNs but also to RNAs would increase the Employer's scheduling options and its ability to efficiently distribute that work.

20. As regards Employer past practice, although Practical Nurses administered medications at the Home prior to 1974, the Employer's practice of assigning the work in dispute exclusively to

RNs throughout the period from 1974 to 1991 provides strong support for ONA's position that the work in dispute should be assigned to RNs. However, this is not conclusive, as the Board has been prepared to alter the status quo in jurisdictional dispute proceedings. (See, for example, *Boise Cascade Canada Ltd.*, [1983] OLRB Rep. Feb. 194, and *Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598.)

21. Article 2.02 of the full-time and part-time collective agreements between ONA and the applicant also provides strong support for ONA's position in these proceedings. In this regard, we find no merit in the contention of Employer's counsel that the introductory phrase contained in Article 2.02 refers to the minimum expectations for providing safe, effective, and ethical nursing care, as set forth in the CNO Standards. In our view, those words refer to the actual standard of nursing care in existence at the Home as a result of the performance by RNs of "the work normally performed by members of this bargaining unit". That actual standard of nursing care has clearly exceeded the CNO Standards for a number of years, in that the Home has been using RNs to perform work which the CNO Standards indicate to be within the competence of RNAs as either a basic or added skill. To the extent that it is necessary for us to interpret Article 2.02 in order to resolve this complaint, we respectfully agree with and adopt the reasoning contained in the May 10, 1984 (unreported) majority award of an arbitration board chaired by H. D. Brown in *South Centennial Manor and Ontario Nurses' Association* (Group Grievance 83-5). In that case which involved the interpretation of a substantially similarly provision, the majority wrote, in part, as follows in finding that South Centennial Manor violated its collective agreement with ONA by assigning to RNAs and the Director of Nursing work which had previously been performed by a day-shift RN who left its employ and was not replaced:

... Article 2.03 ... is as follows:

2.03 In order to protect the standard of nursing care, the Employer agrees that no one outside the above mentioned bargaining unit shall perform the work normally performed by members of this bargaining unit except for the purpose of instruction or experimentation or in event of an emergency situation, and provided that the act of performing the aforementioned operations, in itself does not reduce the hours of work or pay of any nurse.

...

... Without Article 2.03, the Employer could maintain a substantial case, since it was based on proper operational reasons and not made in bad faith, that its decision ... to eliminate the R.N. position on days, was consistent with its operation and commitments [sic] to the patients and Ministry directives. Having regard to Article 2.03 however, the Employer cannot eliminate a position in the bargaining unit and have the duties of that position carried out by others who are not members of the bargaining unit. The parties have commenced that section by stating its purpose as being "to protect the standards of nursing care". That is a recognition that members of the bargaining unit are required to perform the nursing functions involved in the home and that they have the right to do so as opposed to any other persons who might be assigned duties they would normally be expected to perform. The Employer has the right to control its work force and in that regard to layoff employees or to reduce the number of its employees, but it does not have the right to do that by assigning the tasks pertaining to members of this bargaining unit to persons not included in the bargaining unit. When therefore the parties entered into the collective agreement containing the terms referred to in this matter, the Employer's operations changed and that became the status at that time, which applied for the term of that agreement and any renewals thereof.....

22. The reasoning in that case was also adopted and applied by an arbitration board chaired by J. W. Samuels in an (unreported) award dated February 8, 1991 in *Cambridge Country Manor and Ontario Nurses' Association*, which reads in part as follows:

In late-1989, the Employer posted for and then hired a full-time RNA to do the "D2 shift", that is to work from 0800 to 1600 on a permanent basis. Up to this point in time, the D2 shift had been staffed by part-time RNs or by RNAs.

The Association claims that the new arrangement violated Article 2.07 of the collective agreement, which reads:

In order to protect the standard of nursing care, employees not covered by the terms of this agreement will not perform duties normally performed by those employees who are covered by this agreement, except for the purpose of instruction or in emergencies when members of this bargaining unit are not readily available.

• • • •

In our view, Article 2.07 protects members of the bargaining unit from losing work which was "normally performed" by them when the collective agreement came into force....

What is meant by "duties normally performed by those employees"?

In *Little's Nursing Home (Tecumseh) Limited and Ontario Nurses Association* (grievances of Lozinski et al, unreported decision of Roberts, dated May 10, 1983), the Board dealt with a similar provision, except that the work protected was the work "presently" performed by members of the bargaining unit. The Board held that "The employer was obligated to assign to that complement of RNs the same *type and volume* of work that they performed on the effective date of Article 2.05" (at page 14, emphasis added). In our view, the difference in wording between the collective agreement in the *Little's* case and the language in the collective agreement before us ("presently" instead of "normally") means that in our case one establishes the protected work sample over a broader time period than simply the effective date of the collective agreement. We are concerned with the work which was "normally" done by members of the bargaining unit, not simply the work which was done by them at the point in time at which the collective agreement came into force. But the essential meaning of the two provisions is the same--it is the *type and volume* of the work which is protected.

In *South Centennial Manor and Ontario Nurses' Association* (Group Grievance 83-5, unreported decision of Brown, dated May 10, 1984), the Board dealt with a provision which was virtually identical to the one before us. It was held that the members of the bargaining unit were entitled to continue doing the particular day shift work which was taken away from them.

The Employer in our case argued that, because the D2 shift had been staffed by either RNs or RNAs before the change was made, the work in question was not nurses' work but was work which could be done either by RNs or RNAs, and therefore could not be characterized as "duties normally performed by" RNs.

In our view, though sometimes an RNA would do the D2 shift, when an RN was on the shift she was providing nursing care to the residents of Home. Without evidence to the contrary, we accept that nurses provide different care from RNAs. If a resident needed attention, the resident received different care from an RN than from an RNA. When the RN was providing the care, the resident had someone with a different education from an RNA--an education which provides a great expertise, a greater measure of recognition. And this education comes to bear whenever the RN is attending to the needs of a resident.

The evidence before us showed that, throughout 1989 up to the date of the contested change, in each two-week scheduling period, RNs were assigned the bulk of the D2 tours. Between January 1 and December 16, 1989, RNs averaged 10 of the 14 D2 tours in each two-week period. This meant that, for roughly two-thirds of the D2 shifts, residents could count on full nursing care from the person on the shift. Article 2.07 says that, "in order to protect the standard of nursing care", this staffing ought to continue.

In fact, however, after the change RNs almost never staff the D2 shift. This was a substantial change in the "standard of nursing care" on that shift.

We declare that, in December 1989, the Employer violated Article 2.07 of the collective agreement when it assigned to RNAs the work on the D2 shift which was normally performed by RNs, and we order that the Employer return to scheduling the D2 shift as it was normally scheduled before December 1989.

• • • •

23. We respectfully agree with that reasoning and find that it applies even more forcefully in the instant case in which none of the work in dispute has been performed by RNAs, but rather has been performed exclusively by RNs throughout the time that Article 2.02 of the ONA collective agreements has been in force. That fact clearly distinguishes the instant case from the situation which existed in *Fairhaven Home Senior Citizen and Ontario Nurses' Association* (an unreported award dated July 8, 1992, by an arbitration board chaired by I. G Thorne), in which the majority award found no violation of an article similar to Article 2.02 on the grounds that the work in question was not exclusively reserved to RNs, as it had previously been shared with RNAs during the course of successive collective agreements. (The other awards to which we were referred by counsel for CUPE are also similarly distinguishable.) The *Fairhaven* award is also distinguishable on the grounds that it was based in part upon the terms of a Letter of Understanding which expressly contemplated that certain functions performed by RNs would also be performed by RNAs.

24. The interpretation we have placed upon Article 2.02 is also supported by the position taken by ONA in its written submissions to the Brent Board, whose awarding of Article 2.02 was (in the words of arbitrator Brent) intended to "[protect] the interests of the parties expressed to [that] board." Those interests, which are described in the submissions quoted in paragraphs 7 and 8 of this decision, include ONA's interest in protecting its bargaining rights by ensuring that work normally performed by members of the ONA bargaining unit(s) will continue to be performed exclusively by them, except in the limited circumstances described in clauses (a), (b), and (c) of Article 2.02. They also include ONA's interest in maintaining the standard of nursing care at the Home by precluding the Employer from (among other things) using RNAs to replace RNs.

25. Employer's counsel also submitted that in the event the Board rejected his contention that the assignment of work in dispute to RNAs was not violative of Article 2.02, the Board should amend ONA's collective agreement so as to permit the Employer to assign that work to RNAs. However, we are not persuaded that it would be appropriate to do so in the circumstances of this case. As noted above, the Employer is also seeking to obtain such an amendment through the interest arbitration process. Indeed, the Employer's request for relief from this Board could well be viewed as premature, in that the interest arbitration board has not yet ruled on that matter. In our view, interest arbitration is an appropriate forum in which to at least initially seek such a change, as an interest arbitrator, if persuaded that such revision is warranted, will be in a position to make such an adjustment in the context of the total balance of the interest award. Thus, if ONA loses an element of its existing job protection in that manner, it will likely achieve some gains in other areas to offset that loss. It is highly doubtful that this Board would be in a position to adopt a similar approach. Thus, for the Board to grant the Employer's request would be to deprive ONA, without compensation, of an important element of job security which was undoubtedly gained at some expense to other interests through the interest arbitration process.

26. This is not a case in which CUPE has negotiated (or obtained through interest arbitration) a provision requiring the Employer to assign the work in dispute to it. Indeed, as noted by counsel for ONA, this is an Employer generated dispute in which CUPE neither asserted nor had any claim to the work before the Employer elected to assign the work in dispute to RNAs in the manner described above.

27. Having carefully considered the matter and duly weighed the various competing interests, we are not persuaded that it would be appropriate for the Board to alter Article 2.02 at this juncture, in the circumstances of this case.

28. For the foregoing reasons, although the criteria of economy, efficiency, and employer preference provide some support for the position advocated the Employer and supported by CUPE, the criteria of collective bargaining relationships and Employer past practice strongly favour the position asserted by ONA and combine to outweigh those other criteria in the circumstances of this case.

29. Accordingly, the Board hereby orders that the Employer cease assigning the work in dispute to persons covered by the CUPE collective agreement, and that it restore the assignment of the work in dispute to persons covered by ONA collective agreement(s) forthwith. Unless revoked by the Board, this order shall remain effective so long as the Employer's assignment of the work in dispute to RNAs would constitute a violation of Article 2.02 (or any provision which replaces or succeeds it).

30. In view of the foregoing, the continuation dates previously scheduled in respect of this complaint (May 25, 26, 31, and June 4, 8, 9, 10, 14, 15, and 16, 1993) are hereby cancelled.

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**2308-92-G; 2309-92-G** Sheet Metal Workers' International Association, Local 285, Applicant v. **West York Construction 1984 Ltd.**, Responding Party; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599, Applicant v. **West York Construction 1984 Ltd.**, Responding Party

Construction Industry - Construction Industry Grievance - Remedies - Sheet Metal union and Plumbers' union alleging employer failure to comply with "working agreement" binding employer to collective agreements in "residential sector" - Employer claiming that Sheet Metal collective agreement restricted to specialty contractors and that subcontracting clause in Sheet Metal and in Plumbers' collective agreements not applying to it as a general contractor - Employer also asserting that unions would not have been able to get work on construction site identified in grievance because of bid depository arrangement and that damages should be denied - Board finding collective agreements not restricted to "specialty contractors", that working agreement binding employer to the collective agreements, and that subcontracting clauses effective against employer - Board finding employer in violation of collective agreements

**BEFORE:** *Jules Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**APPEARANCES:** *L. Steinberg* and *J. Cartwright* for the applicants, *D. Carter* and *L. Holly* for the Plumbers; *Bruce W. Binning*, *Adam Kuntz* and *B. Foote* for the responding party.

**DECISION OF THE BOARD;** May 25, 1993

1. The applicant's name in Board File #2308-92-G is amended to read: "Sheet Metal Workers' International Association, Local 285".

2. Board File #2308-92-G and 2309-92-G are consolidated.

3. These are two applications under section 126 of the *Labour Relations Act*. The applicant in 2308-92-G ("Sheet Metal") and the applicant in 2309-92-G ("the Plumbers") allege that the responding party ("the company" or "West York") has failed to comply with the terms of the "working agreement" which binds the company to collective agreements in the residential sector in the City of Barrie. The substance of the claim is that the company failed to sublet work to companies who are in a contractual relationship with the Plumbers and/or Sheet Metal.

4. The defence to this grievance is two-pronged. With respect to the Sheet Metal portion of the case, the company submits that the scope of the collective agreement between the Toronto-Residential Air Handling Group and Sheet Metal Workers' International Association, Local Union #285 ("Sheet Metal agreement") is restricted to speciality contractors and that the company is a general contractor. Further, the sub-contracting portion of the agreement (Article 3.2) is modified by the definition of who is a contractor (Article 1.4). Since the company is a general contractor and not a "contractor in the sheet metal industry", then the sublet clause does not apply to the company. With respect to the Plumbers portion of the case, the company asserts that Article 25A.2 did not contemplate the subcontracting of work by general contractors who are bound to the collective agreement between the Mechanical Contractors Association, Barrie and Local Union 599 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada ("the Plumbers agreement"). Similar to the above argument, the definition of contractor in Article 1.2 would not include the company.

5. The second prong of the defence is novel, in that the company asserts that the unions would not have been able to get any work on this site because this was a job with a bid depository and the bids for the mechanical work, including plumbing and sheet metal work, were non-union companies. In effect, the company, in winning the bid for the general contracting portion of the work, was forced to use the low bid depository bid as part of its overall bid. Had it not used the low bid it would have been at a disadvantage when bidding the general contract. The company points to the deal it was able to make with the International Brotherhood of Electrical Workers, and Simplex (a union company) who were willing to undercut the collective agreement to match the bid depository bid in respect of electrical work on the site, which would otherwise have been awarded to Regal, a non-union company. The company relies on the contract law maxim that "in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." Essentially, the company argues that because of the bid depository arrangement, no matter who won the general contractors bid, they would have had to carry a non-union company for the mechanical work and consequently Sheet Metal and the Plumbers would not have received any work from this site.

6. This working agreement between West York Construction (1984) Limited and Toronto-Central Ontario Building and Construction Trades Council, of which both the Plumbers and Sheet Metal are affiliated with, is one of the most all-encompassing recognition agreements that this panel has ever seen. This litigation centres on paragraphs 3 and 4 of the document, which states:

3. The Company agrees to:

(a) Employ only members in good standing of the Affiliated Unions;

(b) Let or sublet contracts only to contractors who are in contractual relationship with the Affiliated Unions;

(c) Ensure and require that only contractors who are in contractual relationship with

the Affiliated Unions shall be let or sublet any contracts or sub-contracts with respect to any of the subject construction work at any project or job in which the Company is engaged regardless of whether the Company has a contractual relationship or otherwise with any contractor or sub-contractor performing any work at such project or job.

4. The Company and the Council, on its own behalf and on behalf of the Affiliated Unions agree to:

(a) Recognize and be bound by the Collective Agreements made between or binding upon any of the Affiliated Unions on the one hand, and any employers' organization on the other hand ("the Collective Agreement"); and

(b) Without limiting the generality of the foregoing, specifically agree that all provisions relating to wages, hours of work and working conditions set forth in any of the applicable Collective Agreements shall be binding on the Company and the contractors referred to in Article 3 hereof. In the event that any of the terms and conditions of any of the Collective Agreements are altered, amended or renewed at any time, the Company and the Affiliated Unions shall be bound by such alterations, amendments or renewals as if original parties thereto. The Collective Agreements are available for inspection by the Company or by the said contractors at the offices of the Council.

7. It is axiomatic, that collective agreements are different in kind from normal contracts. What one may call doctrines or maxims of contract law, may not always apply in the field of labour relations. This is especially so when one is trying to abrogate a collective agreement rather than interpret it. (See: *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975) 8 O.R. (2d) 103.)

8. The working agreement on its face ties West York to the Plumbers agreement and the Sheet Metal agreement. It is perhaps true that it is an anomaly that a general contractor is tied into specialty collective agreements through the working agreement, but nevertheless we see no reason why we should not give clear unambiguous language the weight it deserves. We find the Plumbers agreement and the Sheet Metal agreement are not restricted to "specialty contractors". Further, we find the working agreement binds West York to the Plumbers agreement and the Sheet Metal agreement. As well, we find that the language in both the Sheet Metal agreement and the Plumbers agreement must be read to give effect to the subcontracting language. Those clauses preclude West York from contracting out work to companies that do not have a contractual relationship with the Unions. It is clear that when West York, by operation of the working agreement, became bound to any other collective agreement, that they would be bound in form, substance and spirit.

9. The Board is not unaware of the difficulties facing construction industry parties in the current recessionary times. Union generals feel hard done by, in that they cannot compete in a shrinking market place. These generals are forced to attempt to win bids in the "non-union" side of the construction industry. As well, union generals have not been at the specialty contractors' bargaining table. They may well feel that the specialty contractors have allowed wages to spiral upward in a down market. This may all be true, however the way to redress this is not by failing to live up to obligations under a collective agreement.

10. We find that West York has violated both the Plumbers and the Sheet Metal collective agreements by failing to subcontract the mechanical portion of the bid to companies in contractual relationships with Sheet Metal and the Plumbers.

11. This panel will remain seized of any matter arising out of this decision.

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**1010-92-R; 1062-92-G; 1510-91-G; 3178-92-G** Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 539, Applicants v. #515422 Ontario Limited, c.o.b. as **Woodstock Roofing and Sheet Metal**, Great North Industries Inc. and GNI Construction Ltd., Responding Parties; Sheet Metal Workers' International Association, Local 473, Applicant v. #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal, and GNI Construction Ltd., Responding Parties; Sheet Metal Workers' International Association, Local 539, Applicant v. #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal, and GNI Construction Ltd., Responding Parties; Sheet Metal Workers' International Association, Local 473, Applicant v. #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal, Great Northern Industries Inc., and GNI Construction Ltd., Responding Parties

**Construction Industry - Related Employer - Voluntary Recognition - Board rejecting submission that making related employer declaration would extend, rather than preserve bargaining rights and that voluntary recognition agreement in this case was for a fixed term which ended in April 1992 - Employer cannot enter into collective bargaining relationship on trial or purely time-limited basis - Rule of *contra proferentem* not applying in this case - Board satisfied that no untoward delay by applicants in bringing application and that responding parties not prejudiced by delay - Application granted**

**BEFORE:** G. T. Surdykowski, Vice-Chair, and Board Members G. O. Shamanski and G. McMenemy.

**APPEARANCES:** J. Raso and Bob Brown for the applicant; Paul Brooks and Al Tereschyn for the responding parties.

### **DECISION OF THE BOARD; May 27, 1993**

1. Board File No. 1010-92-R is an application for declarations and ancillary relief under section 1(4) and 64 of the *Labour Relations Act*. Board File Nos. 1510-91-G, 1062-92-G, and 3178-92-G are referrals to the Board of grievances in the construction industry, under section 126 of the Act.

2. At the hearing on May 18, 1993, the applicants indicated that they were not pursuing their section 64 application, and that the parties had agreed that the three grievances should be adjourned pending the disposition of the section 1(4) application. The hearing proceeded on that understanding.

3. The parties filed an "Agreed Statement of Facts" as follows:

#### **AGREED STATEMENT OF FACTS**

1. The two companies, Great Northern Industries Inc. ("Great Northern") and 515422 Ontario Ltd., c.o.b. as Woodstock Roofing and Sheet Metal ("515422/Woodstock") are separate corporate entities.
2. Great Northern and 515422/Woodstock are under common control and direction.
3. Great Northern was incorporated on November 30, 1984.

4. The registered office is 935 Keyes Drive, Woodstock, Ontario.
5. The directors and officers are Allan Tereschyn and Michael L. Twible.
6. "Woodstock Roofing and Sheet Metal" was registered by Great Northern on May 14, 1986. The registration expired on May 13, 1991, and was not renewed.
7. 515422 Ontario Limited was incorporated on August 12, 1982. The first director was Irving Feldman.
8. On August 12, 1982, the head office was registered as P.O. Box 724, Woodstock, Ontario. It is now R.R. #1, Beachville, Mr. Tereschyn's principal place of residence.
9. The principal place of business of 515422 was registered on August 12, 1984 as P.O. Box 724, Woodstock, Ontario.
10. Alan Tereschyn and Michael L. Twible are the present directors and officers.
11. On August 26, 1982, "Great Northern Roofing" was registered as the business style of 515422. It expired on August 25, 1987 and was not renewed.
12. 515422/Woodstock signed a voluntary recognition agreement with the Ontario Sheet Metal Workers Conference on April 10, 1991. The agreement bound Woodstock to both the Sheet Metal Collective Agreement in the ICI sector and the ICI Roofers Collective Agreement, and was operative from April 10, 1991 to April 30, 1992.
13. The Voluntary Recognition Agreement was signed by Robert Brown on behalf of the Union, and Al Tereschyn on behalf of the employer, 515422/Woodstock.
14. Al Tereschyn contacted the Union about wishing to sign this agreement.
15. Prior to this, neither 515422/Woodstock nor Great Northern were bound to the agreements cited in paragraph 12.
16. Al Tereschyn and Michael Twible actively manage both companies.
17. Great Northern is a general contractor and a subcontractor engaged in the supply and installation of roofing and sheet metal work, among other things.
18. 515422/Woodstock is a subcontractor engaged solely in the installation of roofing and sheet metal work.
19. Both companies are operated on a day-to-day basis from the head office and principal place of business of Great Northern, 935 Keyes Drive.
20. Corporate documents, Minutes Books etc. for 515422/Woodstock are kept at R.R. #1, Beachville.
21. Day-to-day documents and books are kept at 935 Keyes Drive. They are moved when they are not needed for day-to-day operation, to R.R. #1, Beachville.
22. Great Northern is the company which bids on all construction work. It performs the installation by its own employees unless the tender requires "union-labour". In that situation, Great Northern subcontracts the installation to 515422/Woodstock.
23. Great Northern owns all equipment, tools, trucks etc. 515422/Woodstock uses these on its jobs. They are supplied without charged [sic] by Great Northern, together with materials and anything else required to do the job.
24. 515422/Woodstock was active in 1982 and 1983, and was inactive prior to the signing of the voluntary recognition agreement.

25. 515422/Woodstock, does not engage in any activity other than the supply of labour to Great Northern.
26. 515422/Woodstock, has no fabrication shop, no assets, no tools, equipment etc.
27. The two companies maintain separate bank accounts, payroll, tax returns, etc. U.I.C. records, W.C.B. records etc.
28. Great Northern receives no assets from 515422/Woodstock.
29. 515422/Woodstock never bids on jobs, but gets all of its contracts from Great Northern.
30. All clerical operations for 515422/Woodstock are done at 935 Keyes Drive, Woodstock - time sheets, payroll, remittances, etc. One person, Josephine Dikken, does accounts receivable for Great Northern and is the bookkeeper for 515422/Woodstock.
31. In its history, 515422/Woodstock has had three contracts for Great Northern:
  - a) Price Club, Kitchener
  - b) Operations Centre, Hamilton
  - c) OMAF, Guelph

All were finished prior to May, 1992. The company has not been active in sheet metal and roofing since then.

32. Twenty of twenty-three employees of 515422/Woodstock were also employees of Great Northern at the same time.
33. The base of operations of both companies is 935 Keyes Drive:
  - a) they "punch in";
  - b) they are sent from 935 Keyes Drive by Al Tereschyn to the job site;
  - c) if they need a drive to the site, they go to 935 Keyes Drive;
  - d) they are driven to the site in a Great Northern truck;
  - e) they use Great Northern tools;
  - f) if they need a ride back to Woodstock, they go in a Great Northern truck;
  - g) their pay cheques are picked up at 935 Keys [sic] Drive, which is used for both companies, and other companies.
34. In some weeks, they worked for both companies. In these situations, they received two pay cheques, one from each company.
35. The telephone number for 515422/Woodstock is/was 539-1617. The number for Great Northern is 537-5873. Both are located at 935 Keyes Drive.
36. The 515422/Woodstock phone was disconnected on July 13, 1992.
37. The telephone ad for Woodstock Roofing and Sheet Metal stated that it is a division of Great Northern.

Agreed to in Toronto this 25th day of March, 1993.

"Gordon Stewart"

For the Applicants

"Paul Brooks"

For the Company Respondents

This agreement was supplemented by the testimony of four witnesses.

4. Allan Tereschyn, a principal, testified on behalf of the responding employers. Cliff Coffin, former Business Manager of Sheet Metal Workers International Union Local 562 in Kitchener (now retired), Bob Brown, Business Manager of Sheet Metal Workers International Association Local 473 in London until May 1992 (now International Organizer for the Sheet Metal Workers International Association), and Gord Stewart, who took over as Business Manager of Local 473 when Brown left to take up his present position, were called as witnesses by the applicants. From their testimony, the following material events emerge in addition to the facts agreed to as aforesaid.

5. In late December 1990 or early January 1991, Great Northern Industries Inc. ("Great Northern") was a successful bidder for certain metal cladding work on a job site at the University of Guelph. However, this was a "union job site"; that is, employers which wished to work on it had to have a collective bargaining relationship with the trade union within whose trade jurisdiction the particular work fell. Great Northern was not a party to any applicable bargaining relationship. Accordingly, Tereschyn contacted Coffin in that respect. Subsequently Tereschyn and Coffin met at Great Northern's offices in Woodstock. Coffin briefly explained the Sheet Metal Workers International Association's standard voluntary recognition agreement, and its Sheet Metal and Roofing provincial collective agreements. When Tereschyn indicated he was interested in pursuing the matter, Coffin referred him to Brown because Great Northern's operations were based in the London Local's geographic jurisdiction.

6. Tereschyn contacted Brown and they met on April 1, 1991. Tereschyn told Brown he wanted to be able to work on "union jobs". They also discussed the Sheet Metal Workers International Association's standard voluntary recognition agreement, the Sheet Metal and Roofing provincial collective agreements, and the remittances required under those collective agreements.

7. Tereschyn signed nothing at the April 1, 1991 meeting. He took a copy of an unsigned voluntary recognition agreement in blank away with him and reviewed it. He testified that he was particularly concerned that the agreement be finite; that is, that it have an end date, because he wanted to pursue a union arrangement and union jobs on a trial basis. Tereschyn did not seek any legal or other advice with respect to the voluntary recognition agreement because he felt it was unnecessary to do so.

8. Tereschyn and Brown met again on April 10, 1991, at which time they signed the voluntary recognition agreement. Tereschyn signed on behalf of "#515422 Ontario Ltd. Woodstock Roofing & Sheet and Metal" [sic], which it was not disputed is the same as the responding party "#515422 Ontario Ltd. c.o.b. as Woodstock Roofing and Sheet Metal ("Woodstock Roofing"), and Brown signed on behalf of the Ontario Sheet Metal Workers Conference and Sheet Metal Workers International Association Local 473.

9. Notwithstanding Tereschyn's concern in that respect, there was never any discussion between him and any union representative about the voluntary recognition agreement being for a finite or trial period. Nor was there any discussion about the operations of or relationship between Great Northern and Woodstock Roofing.

10. Subsequently, in the late summer of 1991, it came to Brown's attention that Great

Northern and Woodstock Roofing were intermingling their employees such that an employee might work for both companies in the course of a week or even a single day. In that respect, Tereschyn also candidly conceded that even when designated as working for Woodstock Roofing, the “union company”, the employees were paid at far below the wage rate stipulated in the applicable collective agreement. Tereschyn testified that no employee ever complained to him about this and that he ensured that every employee received the same net or take home pay by having Woodstock Roofing pay any dues or remittances in that respect to the extent that it was necessary. This failure to pay employees in accordance with the applicable collective agreements did not come to the trade union’s attention until May 1992, after Woodstock Roofing had effectively ceased operating.

11. Section 1(4) of the *Labour Relations Act* provides that:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

This provision applies to situations in which an activity which generates employment relations which are governed by the *Labour Relations Act* is carried on through more than one legal entity, whether or not at the same time. It gives the Board the power to pierce the corporate veil and declare that two or more otherwise separate entities constitute one employer for purposes of the Act, where the Board is satisfied that the entities are engaged in associated or related activities under common direction or control. Section 1(4) operates to modify traditional common-law notions based on the separation between legal entities and the privity of contract. It is a remedial provision intended to prevent the intentional or incidental erosion or bargaining rights due to changes in the structure or form or what is, for practical labour relations purposes, a single business activity.

12. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, the Board is entitled to treat them as constituting one employer for labour relations purposes if they carry on associated or related activities under common control or direction and a trade union’s bargaining rights have been eroded or threatened. The effect of section 1(4) is such that collective bargaining rights need not be congruent with a corporate structure or framework. The purpose of section 1(4) is to preserve the integrity of bargaining rights held by a trade union, however acquired, and the rights of employees to bargain collectively with their employer through that trade union, and to protect them from being undermined by the form, or an alteration in form, of a business or activity.

13. In section 1(4) applications, the Board is concerned with the fundamental relationship between entities. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode or means of production, utilise similar employee skills, or are carried on for the benefit of related principals (see, for example, *Brant Erecting and Hoisting*, [1980] OLRB Reps. July 945 and Oct. 1353). The focus of a section 1(4) inquiry is on the total or overall organization of the business or activity as an economic vehicle (see *Kitchener and Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130, *Parnell Foods Ltd.*, [1992] OLRB Rep. Dec. 1164). The effect of a declaration under section 1(4) is that the affected entities share the rights and obligations of an employer under the Act in any applicable collective agreement or collective bargaining relationship.

14. Section 1(4) is neither an unfair labour practice nor a penalty provision. It also applies

to *bone fide* business decision which directly or incidentally affect bargaining rights. Nor is section 1(4) a “deep pockets” provision (*Total Marketing Incorporated*, [1983] OLRB Rep. Apr. 616). Further, it is so established as to be trite that the purpose of section 1(4) is to preserve bargaining rights, not to extend them or create bargaining rights where there were none.

15. There is no doubt, having regard to the evidence and agreed facts before the Board, that the responding parties are more than one entity which carry on associated or related activities or businesses under common control or direction. The preconditions which must exist before the Board can issue a single employer declaration under section 1(4) therefore exist. The issue is whether the Board should issue such a declaration.

16. The responding employers submitted that the Board should decline to exercise its discretion under section 1(4) of the Act as requested by the applicants because the applicants were or ought to have been aware of the relationship between Great Northern and Woodstock Roofing when the voluntary recognition agreement was entered into, and there has been no erosion of bargaining rights. The responding employers submit that a section 1(4) declaration is inappropriate in this case because it would operate to extend rather than preserve the applicants’ bargaining rights, and because the employees of Great Northern have demonstrated no appetite for collective bargaining. The responding employers also argue that the voluntary recognition agreement was, on its face, for a fixed term which ended on April 30, 1992, and, to the extent that there is any ambiguity in that respect, that the doctrine of *contra proferentem* should be applied and the agreement construed against the applicants because the standard form voluntary recognition agreement had been prepared by the trade union, was not subject to any negotiation, and the trade union did not advise Tereschyn to obtain any legal advice.

17. The voluntary recognition agreement entered into in this case is contained in the following Memorandum of Agreement:

THIS MEMORANDUM OF AGREEMENT

made this 10th day of April, 1991

BETWEEN:

#515422 ONTARIO LTD. WOODSTOCK ROOFING &  
SHEET METAL  
(hereinafter referred to as “the Employer”)

-and-

ONTARIO SHEET METAL WORKERS CONFERENCE  
(hereinafter referred to as “the Union”)

**WHEREAS** the Ontario Sheet Metal and Air Handling Group and the Sheet Metal Workers International Association and the Ontario Sheet Metal Workers Conference have entered into a Collective Agreement expressed to be effective from May 1, 1990 until April 30, 1992 (hereinafter referred to as “the Sheet Metal Agreement”);

**AND WHEREAS** the roofing Employer Bargaining Agency of the Ontario Industrial Roofing Contractors Association and the Built-Up Roofers, Damp & Waterproofing Section of the Ontario Sheet Metal Workers Conference have entered into a Collective Agreement expressed to be effective from May 1, 1990 until April 30, 1992 (hereinafter referred to as “the Roofing Agreement”);

**AND WHEREAS** the Union is entitled to represent the employees of the Employer within the bargaining units hereinafter described;

**NOW THEREFORE** the Employer and the Union hereby acknowledge and agree as follows:

1. the Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all certified journeymen sheet metal workers, registered apprentices, sheeters, deckers, welders, sheeters' assistants, material handlers and probationary employees engaged in the sheeting and decking segment of the sheet metal industry in the employ of the Employer in the Province of Ontario;
2. the Employer and the Union hereby acknowledge and agree to recognize, observe and be bound by all the terms and conditions, both monetary and non-monetary, of the Sheet Metal Agreement for all work covered thereby, including and without limiting the generality of the foregoing, all on-site construction work and shop fabrication work, including any renewals thereof, as if the same was made between the Union and the Employer. The Employer hereby acknowledges that it is in possession of and is familiar with all the terms and conditions of the Sheet Metal Agreement;
3. the Employer hereby recognizes the Union as the exclusive bargaining agent for all employees engaged in but not limited to, the application of roofing, damp-roofing and waterproofing material of any description whatsoever in the employ of the Employer in the Province of Ontario;
4. the Employer and the Union hereby acknowledge and agree to recognize, observe and be bound by all of the terms and conditions, both monetary and non-monetary of the Roofing Agreement for all work covered thereby, including any renewals thereof, as if the same was made between the Union and the Employer. The Employer hereby acknowledges that it is in possession of and is familiar with all the terms and conditions of the Roofing Agreement;
5. in the event of any of the terms and conditions either monetary or non-monetary, of the Sheet Metal Agreement or the Roofing Agreement are in any way altered, added to or amended by the parties thereto, then the parties to this Memorandum of Agreement shall be bound by the same for all of the Employer's operations within the scope of the Sheet Metal Agreement and/or the Roofing Agreement as if original parties thereto and the Employer shall execute such documents as may be presented to it by the Union in order to confirm and acknowledge such intention;
6. this Memorandum of Agreement shall constitute a Collective Agreement and shall be in full force and effect from the 10th day of April, 1991 until April 30, 1992, unless notice of modification is given in writing by either party to the other party 60 days prior to each anniversary date of the Sheet Metal Agreement or the Roofing Agreement.

IN WITNESS WHEREOF, each of the parties has hereto caused this Memorandum of Agreement to be signed by its duly authorized representatives as of the date and year first written above.

SIGNED ON BEHALF OF:

ONTARIO SHEET METAL  
WORKERS CONFERENCE

SHEET METAL WORKERS'  
INT'L ASSOCIATION  
LOCAL 473

"Robert Brown"  
Robert Brown-Bus. Mgr.

"Anne Lawry"  
Witness

THE EMPLOYER:  
#515422 ONTARIO LTD.  
WOODSTOCK ROOFING  
& SHEET METAL

Per: "Al Tereschyn"  
RR#1 Beachville, Ont.  
P.O. Box 724 Woodstock, N4S 8A2  
421-6020  
(telephone number)

18. Although it is not a model of clarity, the clear purpose of this agreement was to:

- a) express the voluntary recognition by Woodstock Roofing of the Ontario Sheet Metal

Workers' Conference as the exclusive bargaining agent for all certified journeymen, sheet metal workers, registered apprentices, sheeters, deckers, welders, sheeters' assistants, material handlers and probationary employees employed by Woodstock Roofing in Ontario, and that Woodstock Roofing would be bound by the provincial agreement then in effect between the Ontario Sheet Metal & Air Handling Group (the Employer Bargaining Agency), and the Sheet Metal Workers' International Association and the Ontario Sheet Metal Workers' Conference (the Employee Bargaining Agency); and to

- b) express the voluntary recognition by Woodstock Roofing of the Ontario Sheet Metal Workers' Conference as the exclusive collective bargaining agent for all roofers employed by Woodstock Roofing in Ontario, and that Woodstock Roofing would be bound by the provincial agreement then in effect between the Roofing Employer Bargaining Agency, and the Employee Bargaining Agency (which is the Sheet Metal Workers' International Association and the Ontario Sheet Metal Workers' Conference) in that respect.

Both of these provincial agreements have since been renewed.

19. The *contra proferentem* rule of contract interpretation or construction is most often used in interpreting insurance contracts, particularly clauses inserted into such contracts for the purpose of limiting or excluding an insurer's liability. However, it is nevertheless a rule of general application. In essence, the rule is that whenever there is an ambiguity in a contract which was drafted and tendered by one party, with no opportunity to modify it, an ambiguity will be construed against the author in favour of the other party. The rule does not apply when there is reasonable certainty as to the intent and meaning of a contract taken as a whole (see *Hillis Oil & Sales v. Wynn's Canada*, [1986] 1 SCR 57 (Supreme Court of Canada)).

20. In this case, the meaning of the voluntary recognition agreement is sufficiently clear and ascertainable that the rule of *contra proferentem* does not apply. Tereschyn, who has throughout acted as the representative and moving mind of both responding employers, knew or ought to have known what the voluntary recognition agreement meant and what he was getting into. To the extent that Tereschyn did not and chose not to obtain advice in that respect, he did so at his peril. He had ample opportunity to do so and neither Brown nor the applicants were under any obligation to ensure that the responding employers obtained advice with respect to the voluntary recognition agreement.

21. Despite the wording of Article 6 of the voluntary recognition agreement, it is just that and not a collective agreement (nor could it be - see section 148(2) of the Act). The dates inserted in Article 6 merely make it clear that Woodstock Roofing is only bound to the two provincial agreements as aforesaid as of April 10, 1991. The reference to April 30, 1992 merely ties into the expiry dates of the provincial agreements to which Woodstock Roofing had agreed to be bound, subject to the renewal provisions of those collective agreements. Like a certificate issued by the Board, a voluntary recognition agreement is spent or becomes subsumed in a collective agreement with respect to the collective bargaining relationship created by the voluntary recognition agreement. In this case, when Tereschyn signed the voluntary recognition agreement on behalf of Woodstock Roofing that company immediately became bound by the provincial agreements referred to in it as aforesaid and the voluntary recognition agreement itself was spent. Further, an employer cannot enter into a collective bargaining relationship on a trial or purely time-limited basis. Unless terminated in accordance with the provisions of the *Labour Relations Act* or abandoned bargaining rights continue to exist (with respect to abandonment, see *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298, *Re. Carpenters District Council Lake Ontario & Hugh Murray (1974) Ltd. and Labourers' International Union of North America, Local 527 et al and John Entwis-*

*ile Construction Limited et al* (1980) 33 OR(2d) 670 (Divisional Court), leave to appeal refused by Court of Appeal, February 2, 1981).

22. The Board has declined to issue a single employer declaration under section 1(4) of the Act in circumstances where a non-unionized company pre-exists a company which is incorporated by the same principal(s) and voluntarily enters into a collective bargaining relationship with a trade union in order to be in a position to perform work on union job sites, where there is no common pool of employees or interchange of employees between the two companies, and there is no indication that work destined for the unionized company has been diverted to the non-union company, or that the non-union company has been used on union or other job sites to the detriment of the unionized company and the trade union (see, for example, *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, *Gerald Davidson Plumbing & Heating*, [1984] OLRB Rep. March 462, *Capricorn Acoustics & Drywall Ltd.*, [1986] OLRB Rep. March 308). On the other hand where two or more employers have used a common pool of employees or intermingled their employees as part of a single economic vehicle or overall organization, the Board has found it appropriate to treat the employer entities as a single employer for Labour Relations purposes pursuant to section 1(4) of the Act (*Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, *Jarrett Construction Ltd.*, [1992] OLRB Rep. May 586; and see also *Bemar Construction (Ontario) Inc.*, OLRB File Nos. 3661-91-R, 3646-91-G, 3656-91-R, August 10, 1992, unreported; and with respect to the Board's general approach in that respect, see *Parnell Foods Limited*, *supra*).

23. In this case, the responding employers used the same employees at all material times. From the very beginning of their dealings with the Ontario Sheet Metal Workers' Conference, the Sheet Metal Workers' International Association, any of the Locals affiliated with them, and their representatives, Great Northern and Woodstock Roofing operated as a single economic vehicle. It is quite apparent that Woodstock Roofing is an artificial device through which Great Northern sought to obtain, within a single overall business organization, the commercial advantages of union association without the corresponding obligations. Indeed, this single economic activity even ignored its obligations to pay the employees employed by its Woodstock Roofing branch in accordance with its collective agreements it had agreed to be bound by. The responding employers had sought to avoid the bargaining rights voluntarily recognized on April 10, 1991 from the very beginning. They have acted in a manner designed to make these bargaining rights meaningless.

24. The responding employers' concern that the employees of Great Northern not have the applicants forced upon them rings rather hollow. For all practical purposes, the employees of Great Northern are the employees of Woodstock Roofing and vice versa. Further, to the extent that it is appropriate for the responding employers to express a concern for their employees, and in our view it is not appropriate, where was this concern when the voluntary recognition agreement was entered into in the first place? Finally, although given notice of these proceedings, no affected employee has come forward to express any such concern.

25. Nor is the suggestion that their employees went along with or "agreed to" the employment arrangements between Great Northern and Woodstock Roofing assist the responding employers. It was not open to the responding employers to "bargain" directly with the employees in that respect, or for the employees to agree to the arrangements, particularly with respect to conditions of employment governed by a collective agreement (section 68(1) of the *Labour Relations Act*, and see recently *Gerrard Construction Ltd.* *supra*).

26. To the extent the responding employers suggested that a section 1(4) declaration should not issue because of the applicants' delay in pursuing the matter, that is no longer something which will by itself cause the Board to decline to issue a declaration. The Board's decision in *KNK*

*Limited*, [1991] OLRB Rep. Feb. 209 (at paragraphs 29-57), with which we respectfully agree, represents the Board's current approach to delay (see also, *Tri-County Contracting*, [1991] OLRB Rep. Dec. 1416 among others). Further, we are satisfied that there was no untoward delay by the applicants in bringing the section 1(4) application herein, and that the responding parties have not been prejudiced by any such delay.

27. We are satisfied that there is no merit to any of the objections raised by the responding employers to a section 1(4) declaration in this case. Nor can we discern any other reason why the declarations requested should not issue. We are satisfied, having regard to the evidence before the Board, that the Board should declare that the responding employers are, and have been since April 10, 1991, one employer for purposes of the *Labour Relations Act*. As in *Bemar Construction (Ontario) Inc.*, *supra*, this is not a retroactive declaration, for the reasons given in *Bemar* at paragraphs 35 and 36 as follows:

35. Lest there be any misunderstanding, we declare that the two respondents are in fact one, for labour relations purposes, from the very inception and incorporation of J.C. Electrical in 1991. To be clear: this is not a *retroactive* declaration, but rather a declaration of what is and always has been, consistent with the remedial purpose of section 1(4). In *J.D.S. Limited*, [1981] OLRB Rep. March 294, the Board explained:

20. At the hearing, the parties raised the issue as to whether a Board declaration under section 1(4) can have effect prior to the time it was made, or whether it could be effective only in the future. We are satisfied that unless a Board declaration under section 1(4) is specifically stated to be otherwise, it has force and effect from the time the associated or related activities or businesses commenced, and does not operate only from the date of the actual Board declaration. In this regard reference is made to the Ontario Divisional Court decision in *Norfolk Hospital Association v. London and District Building Service Workers Union, Local 220*, 77 CLLC 14,094, as well as to the decision of this Board in *Brant Erection and Hoisting*, [1980] OLRB Rep. July 945. It is to be noted that a similar interpretation has been given to the effect of declaration under section 37 of *The British Columbia Labour Code*, which contains wording similar to section 1(4). In the *Caledonian Lands Ltd.* case, [1979] 3 Can L.R.B.R. 12, the British Columbia Labour Relations Board set out the rationale for this approach, and it is one which we would adopt:

I have referred to the statement in the *Community Builders Ltd.* decision of the purpose of a Section 37 determination in cases such as this. A further consideration of that purpose will serve to reinforce the conclusion that a determination under Section 37 that two or more entities are the same employer for the purposes of the collective agreement may well be effective for a period of time prior to the date of the Board's decision to that effect. To reiterate, where the Board makes such a finding, the purpose is, as the Ontario Board has said in relation to a parallel provision in the Labour Relations Act of Ontario,

...to preclude the erosion of bargaining units and bargaining rights through the utilization of separate and legal entities as employers.

(*Retail, Wholesale and Department Store Union, Local 414 A F of L-CIO-CLC and Dominion Stores Limited and Mini-Mart Ltd.*, [1979] 1 Can LRBR 172 at p. 179)

Clearly, the effectiveness of a Section 37 determination in serving this purpose would be radically reduced if the determination were to have no effect prior to the date upon which it is made. To say that such a determination is effective only upon and after the date it is made would be to effectively

establish a route by which an employer could wholly avoid collective bargaining obligations for a significant period of time.

That is because, to begin with, the Board is not able to respond overnight to Section 37 applications. The procedures of this Board, like those of any other judicial or quasi-judicial tribunal, require a period of time within which to function. While this Board is making every effort to minimize that period of time in a manner consistent with the principles of natural justice, there is nevertheless an unavoidable period of time which must elapse following an application made under Section 37 or any other section of the Code before the Board can properly adjudicate and dispose of the application. That means, even assuming the application is well founded, that unless a common employer determination under Section 37 in relation to a collective agreement does have effect prior to that date upon which it is made, an employer could defeat the purposes of the determination for at least the period of time consumed by the Board's adjudicative procedures.

Even if the Board could perform the supernatural task of instant adjudication, there would still be room for an avoidance of collective bargaining obligations if a common employer determination in relation to a collective agreement were to have no effect prior to the date upon which it is made. The fact is that in the construction industry it is possible for an employer to commence a project through the vehicle of a new corporate entity in a manner which is not likely to catch the early attention of the union that is party to a collective agreement with that employer. Without being unduly pessimistic, it is inconceivable that the real world will ever be free of employers who are unwilling to recognize the force of collective bargaining rights and who will seek to defeat those rights in this manner. Trade-unions, on the other hand, are not in the business, nor should they be encouraged to enter the business, of maintaining a police force intended and equipped to detect every such attempt by unscrupulous employers.

As a result of these factors - the time involved in the Board's adjudication and the problem of detection - it is not difficult to conceive of fact patterns which involve sufficient delay to enable the completion of a construction project before the Board has determined under Section 37 that the entity in question is bound by the collective agreement of an associated or related entity. Indeed, the Board has witnessed precisely that fact pattern on more than one occasion. If the Board were to sanction the avoidance of collective bargaining obligations in this way by concluding that common employer determinations in relation to collective agreements are effective only upon and after the date the determination is made, the result would be more than a blueprint for the defeat of the thrust of the Labour Code in the construction industry. Employers would be encouraged to take advantage of the opportunity thus provided to evade collective bargaining obligations. That conduct would, in turn, generate more litigation under Section 37 and an understandable frustration on the part of the building trades unions. In all likelihood, the building trades unions would be persuaded to resort to self help measures which could harm the entire industry. All of these considerations persuade me that it would be manifestly contrary to the objects of the Code expressed in Section 37 to conclude that common employer determinations in relation to collective agreements have no force or effect prior to the date upon which the Board makes those decisions.

These references to the very small minority of employers who would deliberately seek to avoid collective bargaining obligations provide a convenient point of departure for a consideration of the Employer's alternative argument in these proceedings. That argument, it will be recalled, is that it is only in those cases that the Board finds the employer to have acted deliberately to avoid its collective bargaining obligations that a common employer determination in relation to a collective agreement should have

any force prior to the date upon which it is made. If the Board were to adopt that policy, the result would almost certainly be prolonged and perhaps more acrimonious proceedings as Board panels searched through the increased volume of evidence necessary to permit a finding as to the elusive matter of motivation. But these undesirable practical consequences for the Board are not the answer to this argument. Rather, the answer again revolves around the purpose to be served by a Section 37 determination that two or more entities are a single employer for purposes of a collective agreement. That purpose, I reiterate, is to prevent the avoidance or the erosion of collective bargaining rights acquired pursuant to the Labour Code. It must be remembered that not every new corporate entity established by an employer bound by a collective agreement is created for the sinister purpose of avoiding collective bargaining rights. There are many other considerations which may motivate the incorporation of a new company to complete a particular construction project. Tax implications are the legitimate consideration most often cited in this connection. But if the effect of the employer's utilization of a new company (or even an existing company) is to erode existing collective bargaining rights, then a Section 37 determination is an appropriate vehicle to prevent that result whether the effect was intended or not. It is for this reason that proof of a deliberate attempt to avoid collective bargaining obligations has never been a prerequisite to a Section 37 determination. In one of its first decisions under this Section, the Board stated:

The company recognizes that corporate diversity may offer perfectly legitimate business advantages, entirely apart from labour relations issues, in such matters as taxation and financing. The concluding words of Section 37, "for purposes of this Act", confirm that the Section was not intended to interfere with those advantages. That does not mean, however, that the Board won't rely on Section 37 to correct any adverse labour relations consequences of such management decisions, even where clearly made in good faith and for valid reasons. What it means is that the operation of Section 37 does not depend, in my view, on the proof of a malicious intent on the part of the employer. ...The point is, the Board need not and, in most cases, will not concern itself with the issue of employer motives before reaching its conclusions under Section 37. (*Baywood Enterprises Ltd.*, *supra*, at p. 181).

I would, I believe, be counterproductive to decide that the matter of the motivation of the employer should now become a factor in this question of whether a common employer determination for purposes of a collective agreement has any force or effect prior to the date upon which it is made. Even if a new entity is established for reasons which are perfectly innocent under the Labour Code, the time consumed by the union's investigation of the new entity and the Board's adjudication of the union's application can still mean that unless the Section 37 determination does have force and effect prior to the date upon which it is made, those arrangements will have the effect of eroding collective bargaining rights even though not designed for that purpose. The employer's alternative argument must therefore fail as well.

36. If the Board did not make its declaration in the manner described above, section 1(4) could easily be frustrated because of the time taken to detect, investigate and litigate the status of the allegedly related company. A section designed to eliminate the labour relations significance of the alternative corporate shell could be avoided if new corporate shells were created quickly enough. Similarly, an employer could avoid the remedial impact simply by dragging out the litigation - just as an employer could effectively avoid its collective bargaining obligations and liabilities if it could drag out proceedings until they became moot or it became "judgement-proof" (in this regard see the comments at paragraph 30 of the Board's decision of May 5, 1992). That

is precisely the mischief which the Legislature sought to remedy by section 1(4). The addition of the words “whether or not simultaneously” makes it clear that a temporal link between related activities is no longer essential and allows the Board’s declaration to bridge this temporal gap if it seems appropriate to do so. We consider it appropriate here.

28. In the result, the application under section 64 of the *Labour Relations Act* is dismissed. With respect to the application under section 1(4), the board:

- a) declares that Great Northern Industries Inc. and #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal constitute one employer for purposes of the *Labour Relations Act*, effective April 10, 1991; and
- b) declares that Great Northern Industries Inc. and #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal are bound by:
  - i) the provincial agreements in effect between the Labour Relations Section of the Ontario Industrial Roofing Contractors Association, and the Ontario Sheet Metal Workers & Roofers’ Conference and the Sheet Metal Workers’ International Association on or since April 10, 1991; and
  - ii) the provincial agreements in effect between the Ontario Sheet Metal and Air Handling Group, and the Sheet Metal Workers’ International Association and Ontario Sheet Metal Workers’ Conference in effect on or since April 10, 1991.

29. The Registrar is directed to schedule these matters for hearing before this panel for the purpose of hearing the evidence and representations of the parties with respect to all matters remaining in issue between them herein, and specifically, with respect to the grievances in Board File Nos. 1510-91-G, 1062-92-G, and 3178-92-G. Whether or not the Registrar consults with the parties with respect to the scheduling of such hearing dates is left to her discretion.

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## COURT PROCEEDINGS

**3051-92-R (Court File No. 40)** Laroy Mackenzie and Wayne MacKenzie et al. also known as Employees of Hemlo Gold Mines Inc. For a Democratic Choice, Applicant v. United Steelworkers of America and **Hemlo Gold Mines Inc.**, Respondents

**Certification - Charter of Rights and Freedoms - Constitutional Law - Judicial Review - Natural Justice - Petition - Representation Vote - Group of objecting employees filing “petition” in opposition to union after certification application filing date - Objecting employees asking Board to extend application filing date to allow timely filing of petition, and to conduct certification hearing in Thunder Bay - Objecting employees also challenging constitutional validity of section 8(4) of the Act and Rule 47 of the Board’s Rules of Procedure, and asserting violation of rules of natural justice - Board dismissing various objecting employees’ objections in oral ruling - Objecting employees then**

**seeking to have application dismissed on grounds of reasonable apprehension of bias - Board finding no reasonable apprehension of bias and dismissing motion - Company's request that Board exercise its discretion under section 8(3) of the Act to direct representation vote denied - Union enjoying support in excess of 55% in appropriate bargaining unit - Certificate issuing - Divisional Court dismissing objecting employees' judicial review application**

Board decision reported at [1993] OLRB Rep. March 158.

*Ontario Court of Justice (Divisional Court), Maloney, S.J., Campbell and Then JJ., May 31, 1993.*

**The Court (endorsement):** A tribunal loses jurisdiction if its rejection of legally admissible evidence leads to a denial of natural justice. *Trois Rivières v. Larocque* S.C.C. Feb. 25 1993. In the absence of any submissions on the effect of that decision, we assume that the test for legal admissibility in these circumstances is the test of correctness.

It is not clear why the Legislature used different language in the old s. 7 ("at the time the application was made") and the new s. 8 ("the certification application date"). We agree with counsel for the Board that the change in language is unfortunate. It is also unclear why the statute says "certification application date" and the rules say "application filing date."

Notwithstanding this regrettable imprecision it is clear, reading the statute as a whole, that the legislature deliberately intended to disadvantage those opposing certification by making the date on which the union applies for certification the only legally relevant date for the determination of union membership.

The provisions of 8 (4), to use the words of the Board, "put employees at somewhat of a disadvantage in comparison with the union". The statutory disadvantage is substantive because it fixes union membership at the date the union applies for certification and it makes later membership changes legally irrelevant.

Rules of natural justice ensure fairness in the process by which substantive rights are determined. Rules of natural justice do not confer substantive rights such as the right to determine, on a date later than the date on which the union applies for certification, the number of trade union members in the bargaining unit.

The statutory denial of substantive rights does not amount to a denial of natural justice. We see no error in the decision of the Board, and no denial of natural justice.

Notwithstanding Mr. Young's able argument, the application must be dismissed.





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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1993

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**2962-90-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Mike Weber's Construction Company Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 785 (Intervener) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Mike Weber's Construction Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Mike Weber's Construction Company Limited in all sectors of the construction industry in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

**0163-92-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 947465 Ontario Limited c.o.b. as Checker Limousine and Airport Service (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 947465 Ontario Limited carrying on business as Checker Limousine and Airport Service in the City of London and in the Township of North Dorchester, save and except Supervisors, persons above the rank of Supervisor, Dispatchers, Call Takers, Office and Clerical Staff, Mechanics, Maintenance Staff and Multi-lease/Multi-car Operators" (77 employees in unit) (*Having regard to the agreement of the parties*)

**1176-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nickel City Contracting Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Nickel City Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Nickel City Contracting Limited in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

**1522-92-R:** Office and Professional Employees International Union (Applicant) v. McQueston Legal & Community Services (Respondent)

Unit: "all employees of McQueston Legal and Community Services in the Regional Municipality of Hamilton Wentworth, save and except Executive Director, persons above the rank of Executive Director, the Office Manager and Staff Lawyers" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**1627-92-R:** Christian Labour Association of Canada (Applicant) v. Uni-Care Retirement Centres Incorporated c.o.b. as Amber Lea Place (Respondent)

Unit #1: "all employees of Uni-Care Retirement Centres Incorporated carrying on business as Amber Lea Place in the City of Brantford, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (11 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of Uni-Care Retirement Centres Incorporated carrying on business as Amber Lea Place in the City of Brantford regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, and persons above the rank of supervisor” (15 employees in unit) (*Having regard to the agreement of the parties*)

**1875-92-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Nilex Geotechnical Products Inc. (Respondent)

Unit: “all construction labourers in the employ of Nilex Geotechnical Products Inc., in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (32 employees in unit)

**2128-92-R:** United Steelworkers of America (Applicant) v. Low Income People Involvement of Nipissing Inc. (Respondent)

Unit: “all employees of Low Income People Involvement of Nipissing Inc. in the City of North Bay, save and except Executive Director, persons above the rank of Executive Director, students employed pursuant to the Futures Program, and LIPI Program Co-ordinator.” (6 employees in unit)

**2333-92-R:** United Steelworkers of America (Applicant) v. Centre Boreal Centre of Timiskaming (Respondent)

Unit: “all employees of the Centre Boreal Centre of Timiskaming in the District of Timiskaming, save and except Supervisor of Clinical Services, persons above the rank of Supervisor of Clinical Services, Executive Secretary, and students employed during the school vacation period” (20 employees in unit)

**2431-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Bauerhin Technologies Limited Partnership (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Bauerhin Technologies Limited Partnership in the Town of Leamington, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (117 employees in unit) (*Having regard to the agreement of the parties*)

**2858-92-R:** International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Precision Alarms and Signal Systems Limited (Respondent)

Unit: “all employees of Precision Alarms and Signal Systems Limited employed as service technicians at and out of the City of London, save and except service/operation manager and persons above the rank of service/operation manager, office and clerical, persons employed in the central receiving station and persons regularly employed for not more than twenty-four hours per week” (5 employees in unit)

**2922-92-R:** International Union of Elevator Constructors, Local No. 50 (Applicant) v. Federal Elevator Systems Inc. (Respondent)

Unit: “all journeymen and apprentice elevator constructors in the employ of Federal Elevator Systems Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice elevator constructors in the employ of Federal Elevator Systems Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

**3203-92-R:** The Society Staff Union (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees (Respondent)

Unit: “all employees of The Society of Ontario Hydro Professional and Administrative Employees in the Province of Ontario, save and except the senior staff officer and elected representatives of the Society” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3208-92-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. KMT Technical Services, a division of 839197 Ontario Limited (Respondent)

Unit: “all employees of 839197 Ontario Limited in its KMT Technical Services Division in the Province of Ontario, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff, and students regularly employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*)

**3232-92-R:** Teamsters Local Union No. 419 (Applicant) v. Advanced Welding Supplies Limited (Respondent)

Unit: “all employees of Advanced Welding Supplies Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (12 employees in unit)

**3250-92-R:** Independent Canadian Transit Union and its Local 6 (Applicant) v. Olympia and York Developments Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 93 (Intervener)

Unit: “all employees of Olympia & York Developments Limited at L’Esplanade Laurier, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, security guards, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of February 5, 1993” (9 employees in unit)

**3322-92-R:** United Steelworkers of America (Applicant) v. National Protective Service Company Limited (Respondent)

Unit: “all security guards of National Protective Service Company Limited in the Regional Municipality of Ottawa-Carleton, save and except Director of Personnel, persons above the rank of Director of Personnel, Dispatchers, 5 Mobile Patrol Officers, 1 Site Supervisor at Statistics Canada on Holland Avenue in Tunney’s Pasture, the Training Officer, office and clerical staff” (203 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3390-92-R:** International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. P & E Drywall Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of P & E Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of P & E Drywall Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (*Clarity Note*)

**3402-92-R:** United Steelworkers of America (Applicant) v. Tate Andale Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Tate Andale Canada Inc. in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (22 employees in unit)

**3405-92-R:** Canadian Union of Public Employees (Applicant) v. CARSA Inc. (Respondent)

Unit: “all employees of CARSA Inc. c.o.b. as Niagara Region Sexual Assault Centre in the Regional Municipality of Niagara Falls

pality of Niagara, save and except executive director and persons above the rank of executive director” (10 employees in unit) (*Having regard to the agreement of the parties*)

**3435-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. R. Fiedler Meat Products Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of R. Fiedler Meat Products Ltd. on Grigg Drive in the Town of Simcoe, save and except managers, persons above the rank of manager, office and clerical staff” (33 employees in unit) (*Having regard to the agreement of the parties*)

**3561-92-R:** International Association of Machinists and Aerospace Workers (Applicant) v. Premark Canada Inc. (Respondent)

Unit: “all employees of Premark Canada Inc. at its PMI Food Equipment Group Canada Division in the Regional Municipality of Sudbury and the Counties of Algoma, Sudbury, Cochrane, Temiskaming, Nipissing, and Parry Sound, save and except shop managers, field service supervisors, persons above the rank of shop manager or field service supervisor and office and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3626-92-R:** The National Employees Association of Canada (Applicant) v. Nuway Electric Ltd. (Respondent)

Unit: “all employees of Nuway Electric Ltd. in the Province of Ontario, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3627-92-R:** Labourers’ International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited o/a Martin Building Maintenance (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance, employed at the Whiteoaks Mall, 1105 Wellington Road, in the City of London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (24 employees in unit) (*Having regard to the agreement of the parties*)

**3643-92-R:** United Steelworkers of America (Applicant) v. Bradson Mercantile Inc. (Respondent)

Unit: “all security guards employed by Bradson Mercantile Inc. in the Regional Municipality of Ottawa-Carleton, save and except guard inspectors, persons above the rank of guard inspector, office, clerical and sales staff” (160 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3652-92-R:** Canadian Union of Public Employees (Applicant) v. Quadrille Development Corporation c.o.b. as Residence on the Thames (Respondent)

Unit: “all employees of Quadrille Development Corporation c.o.b. as Residence on the Thames in the City of Chatham, save and except Charge Nurse and Supervisors, persons above the rank of Charge Nurse and Supervisor, Bookkeeper and persons for whom any trade union held bargaining rights as of March 16, 1993” (30 employees in unit) (*Having regard to the agreement of the parties*)

**3653-92-R:** Labourers’ International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited o/a Martin Building Maintenance (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance employed at the Westmount Shopping Centre, 785 Wonderland Road South, in the City of London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

**3654-92-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. L.O.F. Glass of Canada Limited (Respondent)

Unit: “all employees of L.O.F. Glass of Canada Limited at its Vanfax Division at its warehouse at 2678 Lancaster Road in Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

**3658-92-R:** Ontario English Catholic Teachers Association (Applicant) v. Lanark, Leeds & Grenville County Roman Catholic Separate School Board (Respondent)

Unit: “all occasional teachers employed by the Lanark, Leeds & Grenville County Roman Catholic Separate School Board in the Counties of Lanark, Leeds and Grenville, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act” (108 employees in unit) (*Having regard to the agreement of the parties*)

**3665-92-R:** Retail, Wholesale and Department Store Union (Applicant) v. Syndicated Capital Properties Inc. operating as Travelodge North Bay (Respondent)

Unit: “all employees of Syndicated Capital Properties Inc. operating as Travelodge North Bay in the City of North Bay, save and except Managers, persons above the rank of Manager, office, clerical and front desk personnel” (25 employees in unit) (*Having regard to the agreement of the parties*)

**3670-92-R:** Canadian Union of Public Employees (Applicant) v. Halton Roman Catholic School Board (Respondent)

Unit: “all education assistants employed by the Halton Roman Catholic School Board in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, educational assistants employed in night and summer school continuing education programs and students employed during the school vacation period” (107 employees in unit) (*Having regard to the agreement of the parties*)

**3675-92-R:** Ontario Public Service Employees Union (Applicant) v. Dalmar Foods Limited (Respondent)

Unit: “all employees of Dalmar Foods Limited at the Elgin Middlesex Detention Centre in the City of London, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of March 15, 1993” (10 employees in unit) (*Having regard to the agreement of the parties*)

**3677-92-R:** Ontario Nurses’ Association (Applicant) v. James Bay General Hospital (Respondent)

Unit: “all registered and graduate nurses regularly employed for not more than 24 hours per week by James Bay General Hospital at Moosonee, Fort Albany and Attawapiskat, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3679-92-R:** Teamsters Local Union 938 (Applicant) v. Key-Com Ontario Limited (Respondent)

Unit: “all employees of Key-Com Ontario Limited in the City of Brampton, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and dependent contractors” (13 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3708-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Main-Gerrard Community Development Co-operative Inc. (Respondent)

Unit: “all employees of Main-Gerrard Community Development Co-Operative Inc. in the Municipality of Metropolitan Toronto, save and except the Board of Directors” (2 employees in unit) (*Having regard to the agreement of the parties*)

**3721-92-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. Mid West Waltham Abrasives Company of Canada Ltd. (Respondent)

Unit: “all employees of Mid West Waltham Abrasives Company of Canada Ltd. in the Town of Strathroy, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period” (17 employees in unit) (*Having regard to the agreement of the parties*)

**3731-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Corporation of the Town of Smooth Rock Falls (Respondent)

Unit: “all employees of The Corporation of the Town of Smooth Rock Falls, save and except supervisors, persons above the rank of supervisor, Public Works Superintendent, Administrator, Treasurer, Recreation Director, Executive Secretary, Crossing Guards and persons for whom any trade union held bargaining rights as of March 22, 1993” (5 employees in unit) (*Having regard to the agreement of the parties*)

**3747-92-R:** United Food and Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Southampton Flour Milling Inc., (Respondent)

Unit: “all employees of Southampton Flour Milling Inc. in the Town of Southampton, save and except forepersons, persons above the rank of foreperson, office and clerical staff, sales staff and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3774-92-R:** Labourers’ International Union of North America, Local 1089 (Applicant) v. 876764 Ontario Ltd. (Respondent)

Unit: “all employees of 876764 Ontario Ltd. c.o.b. as Dale Enterprises at the Nova Chemicals Canada Ltd. plant in the Town of Corunna, save and except supervisors and persons above the rank of supervisor” (15 employees in unit) (*Having regard to the agreement of the parties*)

**3781-92-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Birch Glen Co-Operative Homes Inc. (Respondent)

Unit: “all employees of Birch Glen Co-operative Homes Inc. in the City of Oakville, save and except the Board of Directors” (2 employees in unit) (*Having regard to the agreement of the parties*)

**3784-92-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Pacific Hotel Corporation c.o.b. as L’Hotel (Respondent)

Unit: “all employees of Canadian Pacific Hotel Corporation c.o.b. as L’Hotel in Metropolitan Toronto employed in the reservations, guest services and front desk departments, save and except supervisors, persons above the rank of supervisor, secretary to the front officer manager, night receptionist/night audit employees, persons for whom any trade union held bargaining rights as of March 26, 1993 and students employed during the school vacation period” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3792-92-R:** Labourers’ International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance employed at the Galleria London, 355 Wellington Street, London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

**3795-92-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 763998 Ontario Inc. operated by Deloitte & Touche Inc. as Receiver and Manager (Respondent)

Unit: “all employees of 763998 Ontario Inc. operated by Deloitte & Touche Inc. as Receiver and Manager at 1298 Trafalgar Street, in the City of London, regularly employed for more than 24 hours per week, save and except the Store Manager, persons above the rank of Store Manager, Assistant Store Manager, Department Managers, and Head Cashier/Customer Service Manager” (23 employees in unit) (*Having regard to the agreement of the parties*)

**3798-92-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 978653 Ontario Inc. (Respondent)

Unit: “all employees of 978653 Ontario Inc. in the City of Cambridge, save and except managers, persons above the rank of manager, office and clerical staff” (23 employees in unit) (*Having regard to the agreement of the parties*)

**3802-92-R:** Teamsters Local Union 938 (Applicant) v. Tilden Car Rental Inc. (Respondent)

Unit: “all autohaul drivers of Tilden Car Rental Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and persons for whom any trade union held bargaining rights as of March 26, 1993” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3803-92-R:** Ontario Public Service Employees Union (Applicant) v. Kenora Association for Community Living (Respondent)

Unit: “all employees of Kenora Association for Community Living in the Town of Kenora regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Behavioral Consultants I, Behavioral Consultants II, Supervisors, persons above the rank of Supervisor, Adult Protective Service Workers, Volunteer Co-ordinator, Secretary to the Executive Director, Secretary to the Personnel Officer/Comptroller, Administrative Secretary, students employed in a co-operative program or on a work placement, persons employed in a skill development or vocational training program and persons for whom any trade union held bargaining rights as of March 24, 1993” (47 employees in unit) (*Having regard to the agreement of the parties*)

**3823-92-R:** International Union of Operating Engineers, Local 796 (Applicant) v. 636774 Ontario Ltd. operating as the Hartford Retirement Centre (Respondent) v. Saralyn Mabo, Fran Lapierre (Intervenors)

Unit: “all employees of 636774 Ontario Ltd. operating as the Hartford Retirement Centre in the Village of Morrisburg, save and except supervisors and persons above the rank of supervisor” (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3829-92-R:** The Ontario Public School Teachers' Federation (Applicant) v. The North Shore Board of Education (Respondent)

Unit: “all occasional teachers employed by The North Shore Board of Education in its elementary schools in the North Shore Board of Education, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers' Collective Negotiations Act” (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**3832-92-R:** Canadian Union of Public Employees (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the Ottawa Roman Catholic Separate School Board in the City of Ottawa employed as Instructors, Assessment Instructors and Site Administrators in the English as a Second Language program, save and except Supervisors, persons above the rank of Supervisor and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of March 30, 1993” (43 employees in unit) (*Having regard to the agreement of the parties*)

**3833-92-R:** Canadian Union of Public Employees (Applicant) v. Islington Nursery and Child Care Centre Limited (Respondent)

Unit: “all employees of the Islington Nursery and Child Care Centre Limited in the Municipality of Metropolitan Toronto, save and except assistant supervisors and persons above the rank of assistant supervisor” (14 employees in unit) (*Having regard to the agreement of the parties*)

**3834-92-R:** Canadian Union of Public Employees (Applicant) v. H.G.C. Management Inc. (Respondent)

Unit: “all employees of H.G.C. Management Inc. in the City of Cornwall in its Recycling Program, save and except supervisors and persons above the rank of supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

**3838-92-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance employed at the Century Center, 1067; 1069 and 1071 Wellington Road, London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

**3839-92-R:** Labourers’ International Union of North America, Local 1059 (Applicant) v. Leonard’s Building Maintenance Ltd. (Respondent)

Unit: “all employees of Leonard’s Building Maintenance Ltd. employed at the Northern Telecom Canada Limited, Sise Road, London, save and except foremen, persons above the rank of foreman, office, engineering, technical and sales staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

**0022-93-R:** Service Employees International Union, Local 532 affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Hamilton Integrated Living Project (Respondent)

Unit: “all employees of Hamilton Integrated Living Project in the City of Hamilton, save and except managers, persons above the rank of manager and office staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

**0026-93-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Fast-Co Construction (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Fast-Co. Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Fast-Co. Construction in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit)

**0030-93-R:** Industrial and Commercial Workers Union (Applicant) v. Rozag Management Ltd. (Respondent)

Unit: “all employees of Rozag Management Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0036-93-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. The Lancer Building Corporation (Respondent)

Unit: “all construction labourers in the employ of The Lancer Building Corporation in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

**0046-93-R:** International Union of Operating Engineers, Local 793 (Applicant) v. The Regional Municipality of Halton (Respondent)

Unit: “all employees of The Regional Municipality of Halton in the Waste Management Division, Solid Waste Operations, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

**0048-93-R:** Canadian Union of Public Employees (Applicant) v. Metropolitan Toronto Association for Community Living (Respondent)

Unit: “all employees of the Metropolitan Toronto Association for Community Living in the Child and Family Centres in the Municipality of Metropolitan Toronto, save and except Centre Managers, persons above the rank of Centre Manager, office and clerical employees and any person for whom any trade union held bar-

gaining rights as of the date of application, April 5, 1993” (25 employees in unit) (*Having regard to the agreement of the parties*)

**0049-93-R:** Ontario Public Service Employees Union (Applicant) v. Nu-Mark Food Services Limited (Respondent)

Unit: “all employees of Nu-Mark Services Limited at the Whitby Jail in the Town of Whitby, save and except managers and persons above the rank of manger” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0050-93-R:** Canadian Union of Operating Engineers and General Workers (Applicant) v. Cold Springs Farm Limited (Respondent)

Unit: “all Stationary Engineers employed by Cold Springs Farm Limited in the Town of Thamesford, save and except Chief Engineer and persons above the rank of Chief Engineer” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0053-93-R:** Communications, Energy & Paperworkers Union of Canada (Applicant) v. F.O.C. Fiber Optics Canada Inc. (Respondent)

Unit: “all employees of F.O.C. Fiber Optics Canada Inc. in the Province of Ontario, save and except managers, persons above the rank of manager, sales and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0054-93-R:** The Ontario Public School Teachers’ Federation (Applicant) v. North Shore Board of Education (Respondent)

Unit: “all employees employed as Literacy Program Instructors at North Shore Board of Education in the Town of Elliott Lake, save and except Principals, persons above the rank of Principal and persons for whom any trade union held bargaining rights as of the date of application, April 6, 1993” (4 employees in unit)

**0056-93-R:** Laundry & Linen Drivers & Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Ottawa Central Laundry Transport Inc. (Respondent)

Unit: “all persons employed as drivers by Ottawa Central Laundry Transport Inc. in the Regional Municipality of Ottawa - Carlton, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0062-93-R:** Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hsin Kuang Restaurant (Toronto) Ltd. (Respondent)

Unit: “all employees of Hsin Kuang Restaurant (Toronto) Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (61 employees in unit) (*Having regard to the agreement of the parties*)

**0065-93-R:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Servico Limited/Servico Limitée (Respondent)

Unit: “all service station employees of Servico Limited/Servico Limitée at its service station at 1299 Kingston Road, in the Town of Pickering, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (8 employees in unit) (*Having regard to the agreement of the parties*)

### **Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2716-92-R:** Brewery, Malt and Soft Drink Workers, Local 304 (Applicant) v. Alexandria Sash & Door Co. Limited (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Intervener)

Unit: “all employees of Alexandria Sash & Door Co. Limited employed at Alexandria, Ontario and at Lochiel, Ontario, save and except foremen, supervisors, those above the rank of foremen and supervisors, office staff and persons regularly employed for not more than 24 hours per week” (88 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	94
Number of persons who cast ballots	87
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	87
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	45
Number of ballots marked in favour of intervener	41

**3404-92-R:** Canadian Union of Public Employees (Applicant) v. Central Seven Association for Community Living (Respondent)

Unit #1: “all employees of Central Seven Association for Community Living in the Regional Municipality of Durham, save and except program supervisors, persons above the rank of program supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students employed on a cooperative training program through a school, college, or university, and Family Home Providers” (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	23
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	10

Unit #2: (See Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote)

**3464-92-R:** Canadian Union of Public Employees (Applicant) v. The Credit Valley Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: “all stationary engineers and maintenance employees of The Credit Valley Hospital in Mississauga, save and except Chief Engineer/Supervisors, persons above the rank of Chief Engineer/Supervisors, persons employed under the biomedical engineering program, persons employed under the Fire and Security program and persons regularly employed for not more than 24 hours a week and students employed during the school vacation period” (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	18
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	7

**3493-92-R:** Independent Paperworkers of Canada (Applicant) v. The Beaver Wood Fibre Company Limited (Respondent) v. Communications, Energy and Paperworkers Union of Canada C.L.C. and its Local 228 (Intervener)

Unit: “all employees of the Beaver Wood Fibre Company Limited in Thorold, save and except supervisor, persons above the rank of supervisor, Board Mill Superintendent, Plant Engineer, Chief Stationary Engineer, Process Engineer, Newsprint Superintendent, Controller, Secretary to Plant and Office Manager, Plant Manager, Office Manager, Plant Nurse, Sales Manager, Chemist, Woods Superintendent, Personnel Manager, Maintenance Superintendent and Watchman, and persons in bargaining units for which any trade union held bargaining rights as of March 19, 1987” (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	38
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Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked in favour of intervener	9

**3591-92-R:** United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Qualico Foods Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Qualico Foods Inc. in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and sales staff" (114 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	71
Number of ballots marked against applicant	28

### **Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**3882-91-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Westin Hotel Company Limited (Respondent)

Unit: "all employees of Westin Hotel Company Limited in the City of Ottawa employed as front desk staff, save and except assistant managers, persons above the rank of assistant manager, office and clerical staff, concierge, bell captain, and persons for whom any trade union held bargaining rights as of March 4, 1992" (11 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

**2795-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Woodbow Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all journeymen and apprentice plumbers and pipefitters in the employ of Woodbow

Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of Woodbow Limited in all sectors of the construction industry in the County of Simcoe and the District of Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots marked in favour of applicant	8

## Number of ballots marked against applicant

7

**3014-92-R:** Carleton Administration Support Certified Employees Association (Applicant) v. The Carleton Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all office and clerical employees of The Carleton Board of Education in the Regional Municipality of Ottawa-Carleton, save and except Supervisors, persons above the rank of Supervisor, Administrative Assistants, Personnel Officers, Committee Coordinators, Personnel Administrator -Benefits, Personnel Administrator - Administrative and Support, Communications Officer, Assistant Communications Officer, Compensation Officer, Data Base Administrator, Budget Officer, Chief Accountant, Financial Analyst, Auditor Analyst, Secretary of the Board, Assistant Secretary of the Board, Executive Assistant Secretary - Staff Relations, Secretary - Manager Personnel Services, Personnel Clerk - Superintendent, Control Services, Liaison Officer, Clerk/Typist Directorate, Coordinator - Accounting and Finance, Purchasing Officer, Coordinator Admissions and Assessments, Secretary - Directorate, Secretary to the Secretary of the Board, Coordinator - Human Resources Information Systems, students employed during the school vacation period and students employed in cooperative education programs" (568 employees in unit)

Number of names of persons on revised voters' list	568
Number of persons who cast ballots	403
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	401
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	289
Number of ballots marked against applicant	112
Number of ballots segregated and not counted	2

**3044-92-R:** United Food & Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Mazzer's Catering (Respondent)

Unit: "all employees of Douglas James Mazzer operating as Mazzer's Catering in the Towns of Grimsby and Lincoln, save and except manager and persons above the rank of manager" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	5

**3420-92-R:** Teamsters Local Union No. 419 (Applicant) v. Burnac Corporation (Respondent)

Unit: "all employees of Burnac Corporation at its Provincial Fruit Company Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	5

**3496-92-R:** Ontario Public Service Employees Union (Applicant) v. Children's Aid Society of the Regional Municipality of Waterloo (Respondent)

Unit: "all professional employees of the Children's Aid Society of the Regional Municipality of Waterloo regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Regional Municipality of Waterloo, save and except HOPES Co-ordinator, Team Leaders, Management Information Systems Administrator, Personnel Officer, Program Supervisors, persons above the

rank of Program Supervisor, Comptroller, maintenance and cleaning staff, temporary persons and employees in bargaining units for which any trade union held bargaining rights as of February 26, 1993" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

### Applications for Certification Dismissed Without Vote

**3394-91-R:** United Steelworkers of America (Applicant) v. Eastern Breeders Inc. (Respondent) (58 employees in unit)

**0126-92-R:** Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Unions 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309 (Applicant) v. Moir Crane Service & Machinery Movers Ltd. (Respondent) (2 employees in unit)

**3251-92-R:** Ontario Nurses' Association (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent)

Unit: "all employees of Sudbury General Hospital of the Immaculate Heart of Mary in the crisis department in the City of Sudbury, save and except co-ordinators, persons above the rank of co-ordinator and office clerical staff" (7 employees in unit)

**3730-92-R:** Local Union 353 of the International Brotherhood of Electrical Workers (Applicant) v. Edwards, a Unit of General Signal (Mississauga Office Service Division) (Respondent)

Unit: "all employees of General Signal Limited working at or out of the City of Mississauga in its Service Division of its Edwards Unit, save and except supervisors and persons above the rank of supervisor, office and sales staff" (43 employees in unit) (*Clarity Note*)

**3754-92-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. The Valley's Best Drywall (Respondent) (32 employees in unit)

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**3404-92-R:** Canadian Union of Public Employees (Applicant) v. Central Seven Association for Community Living (Respondent)

Unit #1: (See Bargaining Agents Certified Subsequent to a Pre-Hearing Vote)

Unit #2: "all employees of Central Seven Association for Community Living in the Regional Municipality of Durham regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except program supervisors, persons above the rank of program supervisor, students employed on a co-operative training program through a school, college or university, and Family Home Providers" (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4

**3492-92-R:** Independent Paperworkers of Canada (Applicant) v. The Beaver Wood Fibre Company Limited (Respondent) v. Communications, Energy and Paperworkers Union of Canada C.L.C. and its Local 192 (Intervener)

Unit #1: "all employees of the Beaver Wood Fibre Company Limited in Thorold, save and except Bd. Mill Superintendent, Plant Engineer, Process Engineer, Chief Stationary Engineer, Controller, Secretary to Plant

and Office Manager, Plant Manager, Office Manager, Plant Nurse, Sales Manager, Chemist, Personnel Manager, Maintenance Superintendent and Watchman are part of the Management of the Company, employees covered by a collective agreement between Communications, Energy and Paperworkers Union of Canada C.L.C. Local 192 - Office Branch and the Beaver Wood Fibre Company Limited and employees covered by a collective agreement between Communications, Energy and Paperworkers Union of Canada C.L.C. and its local 228 and the Beaver Wood Fibre Company Limited" (88 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	76
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	39

**3501-92-R:** Canadian Security Union (Applicant) v. Ensign Security Services Ltd. (Respondent)

Unit #1: "all employees of the responding party in the Regional Municipalities of Halton and Peel and in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff and employees regularly employed for not more than 24 hours per week" (82 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	1

**3541-92-R:** Ontario Public Service Employees Union (Applicant) v. Wallaceburg & Sydenham District Association for Community Living (Respondent)

Unit #1: "all employees of Wallaceburg & Sydenham District Association for Community Living in the Town of Wallaceburg, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	24

**Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**2423-89-R:** Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 397940 Ontario Limited, c.o.b. as Blair Construction Eastern (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of 397940 Ontario Limited, c.o.b. as Blair Construction Eastern, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of 397940 Ontario Limited, c.o.b. as Blair Construction Eastern, in all other sectors in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	6

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

**1119-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 2 Ontario (Applicant) v. C. Santos Masonry (Respondent) v. Labourers' International Union of North America, Local 183 (Objectors)

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of C. Santos Masonry in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices in the employ of C. Santos Masonry in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3
Number of names of persons on revised voters' list	4
Number of persons who cast ballots	1
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	1

Unit #2: "construction labourers in the employ of C. Santos Masonry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3
Number of names of persons on revised voters' list	4
Number of persons who cast ballots	1
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	1

**3202-92-R:** International Union United Automobile, Aerospace & Agricultural Implement Workers of America UAW (Applicant) v. The Royal Victoria Hospital of Barrie (Respondent)

Unit: "all employees employed as security officers by The Royal Victoria Hospital of Barrie in the City of Barrie, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

**3262-92-R:** Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of Huntsville (Respondent)

Unit: "all employees of The Corporation of the Town of Huntsville employed in the water and sewer department, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons for whom any trade union held bargaining rights as of February 10, 1993" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	12
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

**3365-92-R:** The Canadian Union of Public Employees (Applicant) v. Winchester District Memorial Hospital (Respondent) v. Independent Canadian Transit Union and its Local 6 (Intervener)

Unit: "all Stationary Engineers employed by Winchester District Memorial Hospital at Winchester, Ontario, save and except Chief Engineers and persons above the rank of Chief Engineer" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	3

### Applications for Certification Withdrawn

**2853-92-R:** Labourers' International Union of North America, Local 247 (Applicant) v. Bradsil (1967) Limited (Respondent) v. Group of Employees (Objectors)

**3133-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. 972132 Ontario Ltd. c.o.b. as York Concrete Forming and Ani-Wall Forming Limited (Respondents)

**3701-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. 832038 Ontario Ltd. c.o.b. as Fiedler Meat Products (1991) (Respondent)

**3709-92-R; 3711-92-R:** London and District Service Workers' Union Local 220 (Applicant) v. Sunbeam Residential Development Centre (Rainbow Residential Services) (Respondent)

**3778-92-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Applicant) v. Delta Serv-Tech, a Division of Catalytic Maintenance Inc. (Respondent)

**3799-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Davmark Developments Limited (Respondent)

**3825-92-R:** Hospitality, Commercial and Service Employees Union Local 73 (Applicant) v. 467151 Ontario Ltd. c.o.b. as The Crest Hotel in Thunder Bay (Respondent)

**3843-92-R:** Teamsters Local Union No. 419 (Applicant) v. Beam Scope Canada Inc. (Respondent)

**0043-93-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Caligo (Respondent)

**0139-93-R:** Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Simcoe County Branch (Respondent)

**0285-93-R:** Retail, Wholesale and Department Store Union (Applicant) v. Northern Uniform Service Corp. (Respondent)

## **APPLICATION FOR COMBINATION OF BARGAINING UNITS**

**3249-92-R:** Independent Canadian Transit Union and its Local 6 (Applicant) v. Olympia and York Developments Limited (Respondent) (*Granted*)

**3252-92-R:** Ontario Nurses' Association (Applicant) v. Sudbury General Hospital of the Immaculate Heart of Mary (Respondent) (*Dismissed*)

**3411-92-R:** United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent) (*Withdrawn*)

**3678-92-R:** Ontario Nurses' Association (Applicant) v. James Bay General Hospital (Respondent) (*Granted*)

**3702-92-R:** United Food and Commercial Workers International Union, Local 175 (Applicant) v. 832038 Ontario Ltd. c.o.b. as Fiedler Meat Products (1991) (Respondent) (*Withdrawn*)

**3710-92-R; 3712-92-R:** London and District Service Workers' Union Local 220 (Applicant) v. Sunbeam Residential Development Centre (Rainbow Residential Services) (Respondent) (*Withdrawn*)

**3796-92-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. 763998 Ontario Inc. operated by Deloitte & Touche Inc. as Receiver and Manager (Respondent) (*Withdrawn*)

**3826-92-R:** Hospitality, Commercial and Service Employees Union Local 73 (Applicant) v. 467151 Ontario Ltd. c.o.b. as The Crest Hotel in Thunder Bay (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER**

**1042-92-R:** Retail, Wholesale and Department Store Union (Applicant) v. Colonial Furniture (Ottawa) Limited and Fred Guy Moving and Storage Ltd./Parkway Van Lines Ltd. (Respondents) (*Withdrawn*)

**1260-92-R:** United Garment Workers of America, Local 253 (Applicant) v. Albert Sliwinski Limited c.o.b. as Avon Sportswear and Victory Cap and Sportswear Limited (Respondents) (*Withdrawn*)

**2140-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Harrowston Development Corporation (formerly First City Development Ltd.) and First City Trust Company, both c.o.b. as Archway Homes and/or Gibraltar Building Corporation Limited (Respondents) (*Granted*)

**2156-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. The Sub-Con Industrial Group Inc. and Bulk-Store Structures Inc. (Respondent) (*Granted*)

**2205-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Commercial Construction & Drywall Co. Ltd. and Clausen Drywall Contracting Limited (Respondents) (*Granted*)

**2693-92-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 44351 Ontario Limited c.o.b. as Marlee Electric Company, Peat Marwick Thorne Inc., Plaza Electric Contractors Ltd. and Millway Electric Co. Ltd. (Respondents) (*Withdrawn*)

**2956-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Helm Acoustical Drywall Co. Ltd., Helm Interior Ltd. and Helm Bros. Contracting Ltd. (Respondents) (*Withdrawn*)

**3692-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of Amer-

ica (Applicant) v. Innovative Architectural Systems Inc., TMN Installations Ltd., SKR Installations Ltd., TLT Installations Ltd. and Kobul Interiors, (Respondents) (*Withdrawn*)

**3728-92-R:** United Food and Commercial Workers Union, Local 175 (Applicant) v. R. Fiedler Meat Products Ltd. and 832038 Ontario Ltd. c.o.b. as Fiedler Meat Products (1991) (Respondents) (*Withdrawn*)

**3841-92-R:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Don-Arc & Associates Limited and 27 Contracting Ltd. (Respondents) (*Granted*)

## SALE OF A BUSINESS

**1042-92-R:** Retail, Wholesale and Department Store Union (Applicant) v. Colonial Furniture (Ottawa) Limited and Fred Guy Moving and Storage Ltd./Parkway Van Lines Ltd. (Respondents) (*Withdrawn*)

**1260-92-R:** United Garment Workers of America, Local 253 (Applicant) v. Albert Sliwinski Limited c.o.b. as Avon Sportswear and Victory Cap and Sportswear Limited (Respondents) (*Withdrawn*)

**2140-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Harrowston Development Corporation (formerly First City Development Ltd.) and First City Trust Company, both c.o.b. as Archway Homes and/or Gilbrator Building Corporation Limited (Respondents) (*Granted*)

**2156-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. The Sub-Con Industrial Group Inc. and Bulk-Store Structures Inc. (Respondent) (*Granted*)

**2204-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Commercial Construction & Drywall Co. Ltd. and Clausen Drywall Contracting Limited (Respondents) (*Granted*)

**2693-92-R:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 44351 Ontario Limited c.o.b. as Marlee Electric Company, Peat Marwick Thorne Inc., Plaza Electric Contractors Ltd. and Millway Electric Co. Ltd. (Respondents) (*Withdrawn*)

**2956-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Helm Acoustical Drywall Co. Ltd., Helm Interior Ltd. and Helm Bros. Contracting Ltd. (Respondents) (*Withdrawn*)

**3692-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Innovative Architectural Systems Inc., TMN Installations Ltd., SKR Installations Ltd., TLT Installations Ltd. and Kobul Interiors (Respondents) (*Withdrawn*)

**3841-92-R:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Don-Arc & Associates Limited and 27 Contracting Ltd. (Respondents) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1446-92-R:** Pam Griffore and Cindy Lucier (Applicants) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 127 (Respondent) v. Venture Industries Canada Ltd. (Intervener)

Unit: "all regular plant employees of Venture Industries Canada Ltd. at its plant location, Wallaceburg, Ontario, save and except foremen, persons above the rank of foreman, office staff, and sales staff, and students employed during the summer vacation period" (12 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	3

**3137-92-R:** Jason Barlow (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. David Chapman's Ice Cream Limited (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of David Chapman's Ice Cream Limited in the Town of Markdale regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

**3138-92-R:** Vernon Scott (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. David Chapman's Ice Cream Limited (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of David Chapman's Ice Cream Limited in the Town of Markdale, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (37 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	31

**3479-92-R:** Ontario Food Terminal Board (Police Dept. Employees) (Applicant) v. International Union, United Plant Guard Workers of America, Local 1962 (Respondent) v. Ontario Food Terminal Board (Intervener) (*Withdrawn*)

**3657-92-R:** Employees of Wotherspoon Foundry Ltd. (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Wotherspoon Foundry Ltd. (Intervener) (*Granted*)

**3746-92-R:** Susan Dentelbeck, Mary Gazdik, Edith Sinclair (Applicant) v. CUPE Local 1281 (Respondent) v. University of Toronto Staff Association (Intervener) (*Withdrawn*)

**0007-93-R:** Kirsten A. Taylor (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Dismissed*)

**0070-93-R:** Vladimir Rogovsky (Applicant) v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters (Respondent) v. Airlift Limousine Service Limited (Intervener) (*Granted*)

**0138-93-R:** Daniel E. McCallum (Applicant) v. Retail, Wholesale and Department Store Union AFL CIO CLC Local 414 (Respondent) v. Able-Atlantic Taxi (1989) Ltd. (Intervener) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**0214-93-U:** J-Aar Excavating Limited (Applicant) v. International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers' Union, Local 880, Gary Kitchen, Tom Baldwin and Frank Biekx (Respondents) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**3431-90-U:** Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Mike Weber's Construction Company Limited (Respondent) (*Withdrawn*)

**1847-91-U; 1848-91-U; 1849-91-U:** James Dewar (Applicant) v. International Union of Operating Engineers, Local 793 and R.M. Belanger Limited (Respondents) (*Withdrawn*)

**0072-92-U:** Local 527, Office and Professional Employees International Union (Applicant) v. The Board of Education for the City of Hamilton (Respondent) (*Dismissed*)

**0604-92-U:** Canadian Union of Educational Workers (Applicant) v. McMaster University (Respondent) (*Withdrawn*)

**0659-92-U:** Gary Polowski (Applicant) v. Canadian Paperworkers Union Local 239 and Abitibi - Price Inc. Provincial Papers Division (Respondents) (*Withdrawn*)

**0674-92-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The Hudson's Bay Company (Respondent) (*Withdrawn*)

**1043-92-U:** Retail, Wholesale and Department Store Union (Applicant) v. Colonial Furniture (Ottawa) Limited and Fred Guy Moving and Storage Ltd./Parkway Van Lines Ltd. (Respondents) (*Withdrawn*)

**1183-92-U:** Hotel Employees' and Restaurant Employees' Union, Local 604 (Applicant) v. Walsh's (Respondent) (*Granted*)

**1569-92-U:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nickel City Contracting Limited (Respondent) (*Withdrawn*)

**1892-92-U:** Vince Di Pierro (Applicant) v. Local 79 Canadian Union of Public Employees (CUPE) (Respondent) (*Dismissed*)

**1953-92-U:** Ottawa-Carleton Public Employees Union, Local 503 (C.U.P.E.); Civic Institute of Professional Personnel, C.U.P.E. Local 2187 (Applicants) v. The Corporation of the City of Ottawa, Jacqueline Holzman, Mayor, Dave O'Brien, Chief Administrative Officer, Councillor Tim Kehoe, and Suzanne McGlashan, Commissioner Corporate Services (Respondents) (*Granted*)

**2002-92-U:** Stephen Konowal (Applicant) v. U.S.W.A. Local Union No. 8233 (Respondent) v. Canada Pipe Company Limited (Intervener) (*Terminated*)

**2070-92-U:** Graham MacIsaac in his personal capacity and on behalf of members of Local Union 721 of the International Association of Bridge, Structural and Ornamental Iron Workers (Applicant) v. Local Union 721 of the International Association of Bridge, Structural and Ornamental Iron Workers (Respondent) v. The Ironworkers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers (Interveners) (*Dismissed*)

**2196-92-U:** Labourers International Union of North America, Local 1081 (Applicant) v. George and Asmus-sen Limited (Respondent) (*Granted*)

**2233-92-U:** Utility Workers of Canada (Applicant) v. The Public Utilities Commission of the City of Scarborough (Respondent) (*Withdrawn*)

**2390-92-U:** Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) (*Withdrawn*)

**2484-92-U:** Riece Stewart (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

**2490-92-U:** Energy and Chemical Workers Union, Local 599 (Applicant) v. Anco Chemicals Limited (Respondent) (*Withdrawn*)

**2579-92-U:** John Foster (Applicant) v. CUPE Local 79 - Ont. Human Rights, The City Housing Department, City of Toronto Management Services (Respondents) (*Dismissed*)

**2580-92-U; 2769-92-U:** Ontario Nurses' Association (Applicant) v. West Lincoln Multilevel Health Facility c.o.b. Deer Park Villa (Respondent) v. Christian Labour Association of Canada (Intervener) (*Withdrawn*)

**2664-92-U:** Bob Fil and Kaz Zgorka (Applicants) v. B. Gerlach & Son Enterprises Inc. (Respondent) (*Granted*)

**2800-92-U:** Bob Patil, Vijay Metha, John Olkowicz, Allan Heath, Elizabeth Felix, Ramdin Haimraj, Chan Birjasingh, Mary Blake, and John Deonarine (Applicant) v. Sunworthy Wallcoverings, A Division of Borden Co. and Communications, Energy and Paperworkers of Canada Local 304 (Respondents) (*Dismissed*)

**2864-92-U:** William Hill Sr. (Applicant) v. Teamsters Local 938 (Respondent) (*Withdrawn*)

**2970-92-U:** Derrick Adolphus Pollard (Applicant) v. United Steel Workers of America, Local 9032 (Respondent) v. Uddeholm Limited (Intervener) (*Withdrawn*)

**2975-92-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Trench Electric (Respondent) (*Withdrawn*)

**2980-92-U:** Dominique Marotte (Applicant) v. C.A.W. Local 195 (Respondent) v. Mr. Nap Denomme (Intervener) (*Withdrawn*)

**3236-92-U:** Hospitality, Commercial & Service Employees Union, Local 73 (Applicant) v. 467151 Ontario Limited c.o.b. as The Crest Hotel (Respondent) (*Withdrawn*)

**3335-92-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Law Development Group, Law Development Group (Bolton) Limited, Law Development Group (Georgetown) Limited, Law Development Group Georgetown (No.2) Limited, Law Development Group Georgetown (No.3) Limited, Law Development Group (Mount Albert) Limited, Law Development Group (Mississauga) Limited (Respondent) (*Withdrawn*)

**3336-92-U:** Victor Rochon (Applicant) v. The United Steel Workers of America (Local 6457) (Respondent) (*Dismissed*)

**3344-92-U:** John Maloney (Applicant) v. Wayne Taylor, Jose Esquada, Rajeev Khudja - of Delta Chelsea Inn (Respondents) (*Withdrawn*)

**3497-92-U; 3498-92-U:** The Service Employees International Union, Local 204 (Applicant) v. Lifestyle Retirement Communities Partnership, c.o.b. as Donway Retirement Residences and Senior Apartments (Respondent) (*Withdrawn*)

**3503-92-U:** Robert Blackwood, Catherine Taylor (Applicant) v. Canadian Union of Public Employees, Local 1265 (Respondent) v. The Board of Education for the City of North York (Intervener) (*Withdrawn*)

**3511-92-U:** Silvano De Vellis (Applicant) v. The United Steelworkers of America (Respondent) v. Winston Steel Inc. (Intervener) (*Withdrawn*)

**3518-92-U:** Joe Shaughnessy (Applicant) v. U.A. Local 463, Brian Christie, Business Manager (Respondent) (*Withdrawn*)

**3572-92-U:** Mr. Ramsy Ali and including, The attached list of employees of Aero Environmental Limited employees and members of the "G.M.P." - Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 28B (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. "G.M.P." - Glass, Molders, Pottery, Plastics and Allied Workers International Union (Respondent) v. Aero Environmental Limited (Intervener) (*Dismissed*)

**3622-92-U:** Canadian Union of Public Employees Local 982 (Applicant) v. The Toronto Grace Hospital (Respondent) (*Withdrawn*)

**3624-92-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. Central Chevrolet Oldsmobile Incorporated London (Respondent) (*Withdrawn*)

**3625-92-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Applicant) v. 652605 Ontario Inc. c.o.b. as Loeb IGA Lincoln Heights (Respondent) (*Withdrawn*)

**3647-92-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Asea Brown Boveri Inc. (Respondent) (*Withdrawn*)

**3650-92-U:** Derrick P. Roy (Applicant) v. The Hotel Employees Restaurant Employees Union Local 75, The Inn On The Park (Respondents) (*Withdrawn*)

**3651-92-U:** Ron D. Clark (Applicant) v. United Plant Guard Workers of America Amalgamated Plant Guards Local 1956 (Respondent) v. Burns International Security Services Inc. (Intervener) (*Withdrawn*)

**3672-92-U:** Janice Louise Smith (Applicant) v. United Food and Commercial Workers Local Unions 175/633 (Respondent) (*Withdrawn*)

**3674-92-U:** Erwin Fisher (Applicant) v. Blue Line Taxi Co. Ltd. and Joseph Cramer (Respondent) (*Withdrawn*)

**3686-92-U:** London and District Service Workers' Union, Local 220 (Applicant) v. Women's Emergency Centre (Woodstock) Inc. (Respondent) (*Withdrawn*)

**3693-92-U:** Carpenters & Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Innovative Architectural Systems Inc., TMN Installations Ltd., SKR Installations Ltd., TLT Installations Ltd. Kobul Interiors, (Respondents) (*Withdrawn*)

**3733-92-U:** Terry S. Bergeron, Jerry Dumond (Applicants) v. Retail, Wholesale and Department Store Union, Local 414 (Respondent) (*Withdrawn*)

**3753-92-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Central Chevrolet Oldsmobile Incorporated London (Respondent) (*Withdrawn*)

**3775-92-U:** Fernand Wilfred Dubeau (Applicant) v. Northstar Mechanical (Respondent) (*Withdrawn*)

**3783-92-U:** London and District Service Workers' Union, Local 220 (Applicant) v. Double M & M Incorporated (Respondent) (*Withdrawn*)

**3797-92-U:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 763998 Ontario Inc. operated by Deloitte & Touche Inc. as Receiver and Manager (Respondent) (*Withdrawn*)

**3800-92-U:** Quintino Verrilli (Applicant) v. Kerbel Group (Respondent) (*Withdrawn*)

**3809-92-U:** Carlo C. Rossetti (Applicant) v. C.P.U. Local #39 Canadian Paperworkers Union (Respondent) (*Withdrawn*)

**3813-92-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Aurora Retirement Centre (Respondent) (*Withdrawn*)

**3822-92-U:** United Food and Commercial Workers Union Local 175/633 (Applicant) v. R. Fiedler Meat Products Ltd. (Respondent) (*Withdrawn*)

**3831-92-U:** Tony Furtado, Peter Brum (Applicants) v. Local 75 Hotel Employees Restaurant Employees and Caterair International (Respondents) (*Withdrawn*)

**3837-92-U:** Piara Auglay (Applicant) v. Dexter Lawson and United Steelworkers Local 2890 (Respondents) (*Withdrawn*)

**3844-92-U:** Teamsters Local Union No. 419 (Applicant) v. Beam Scope Canada Inc. (Respondent) (*Withdrawn*)

**0021-93-U:** Carlo Alberto Di Vincenzo (Applicant) v. National Magnet Wire Inc. (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**0028-93-U:** Betty S Biddle (Applicant) v. Local 220 London & District Service Workers Union Rep - Roy Jaques (Respondent) (*Withdrawn*)

**0044-93-U:** Teamsters Local Union 938 (Applicant) v. Key-Com Ontario Limited (Respondent) (*Terminated*)

**0052-93-U:** Sheran Alwis (Applicant) v. Bert Zeldenrust, Chairman C.A.W. Local 1285 (Respondent) (*Withdrawn*)

**0081-93-U:** Ronald O'Brien (Applicant) v. Go Transit (Respondent) (*Dismissed*)

**0147-93-U:** Vittorio Menna (Applicant) v. Mauro Mastracci (Respondent) (*Dismissed*)

**0152-93-U:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. A & A Rebar Placers Ltd. (Respondent) (*Withdrawn*)

**0158-93-U:** Martin Thorne (Applicant) v. U.F.C.W. Local 1227 (Respondent) (*Withdrawn*)

**0159-93-U:** United Steelworkers of America (Applicant) v. Circlet Foods Inc. (Respondent) (*Granted*)

**0229-93-U:** Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Limited (Respondent) (*Withdrawn*)

**0243-93-U:** Mike Fois (Applicant) v. Atlas Steels (Respondent) (*Dismissed*)

**0299-93-U:** Rajistree Bhatti (Applicant) v. Inglis Limited (Respondent) (*Dismissed*)

## **APPLICATION FOR INTERIM ORDER**

**3812-92-M:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Aurora Retirement Centre (Respondent) (*Withdrawn*)

**3845-92-M:** London and District Service Workers' Union, Local 220 (Applicant) v. Women's Emergency Centre (Woodstock) Inc. (Respondent) (*Withdrawn*)

**0102-93-M:** J. Wiedeman Contracting Limited (Applicant) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Respondent) (*Dismissed*)

**0160-93-M:** United Steelworkers of America (Applicant) v. Circlet Foods Inc. (Respondent) (*Granted*)

**0228-93-M:** Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Limited (Respondent) (*Withdrawn*)

## **APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT**

**3756-92-M:** The Textile Rental Institute of Ontario by and on behalf of Booth Avenue Hospital Laundry Inc. Centennial Hospital Linen Services, and London Hospital Service and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicants) (*Granted*)

**3757-92-M:** The Textile Rental Institute of Ontario, Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicants) (*Granted*)

**3776-92-M:** Elfe Juvenile Products Inc. (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

**0072-93-M:** Gibson Cleaners Co. Ltd. (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

## **JURISDICTIONAL DISPUTES**

**0657-91-JD:** Sheet Metal Workers' International Association, Local 537 (Applicant) v. Kora Mechanical Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

**0789-91-JD:** Sayers & Associates Limited (Applicant) v. Sheet Metal Workers' International Association Local 30 and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Granted*)

**0875-91-JD:** Harold R. Stark, Division of William Stark Group Inc. (Applicant) v. Sheet Metal Workers' International Association Local 392, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Respondents) v. Ontario Sheet Metal & Air Handling Group (Intervener) (*Granted*)

**1670-91-JD:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. E.S. Fox Limited and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

**1687-91-JD:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Sheet Metal Workers' International Association, Local 30 and English & Mould Ltd. (Respondents) v. Ontario Sheet Metal and Air Handling Group (Intervener) (*Granted*)

**2030-91-JD:** Association of Allied Health Professionals: Ontario (Applicant) v. Eastern Ontario Health Unit (Respondent) (*Granted*)

**2164-91-JD:** Ontario Nurses' Association (Applicant) v. Eastern Ontario Health Unit, Association of Allied Health Professionals: Ontario, and Canadian Union of Public Employees, Local 1997 (Respondent) (*Granted*)

**3441-92-JD:** Labourers' International Union of North America, Local 837 (Applicant) v. Bono General Construction Ltd. and International Union of Operating Engineers, Local 793 (Respondents) (*Granted*)

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1513-92-M:** CAW Local 1980 (Applicant) v. Ford Electronics Manufacturing Corporation (Respondent) (*Dismissed*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1715-92-OH:** Carl Yeates and United Electrical, Radio and Machine Workers of Canada, Local 520 (Applicant) v. Hoover Canada Inc. (Respondent) (*Withdrawn*)

**2078-92-OH:** Herbert E. Rollins (Applicant) v. Falconbridge Smelter Supervisors (Respondent) v. Mel Papke and Canadian Union of Mine Mill & Smelter Workers Union Local 598 (Intervener) (*Withdrawn*)

**3394-92-OH:** Canadian Union of Public Employees and its Local 3426 (Applicant) v. Geraldton District Association for Community Living (Respondent) (*Withdrawn*)

**3424-92-OH:** Stephen Andrew Carroll (Applicant) v. Sewer Rooter Ltd. (Respondent) (*Withdrawn*)

**3604-92-OH:** Edward Ronald Clewlow (Applicant) v. Stan Cartwright Bickley Ford Sales Ltd. (Respondent) (*Withdrawn*)

**3698-92-OH:** Kevin McCormick (Applicant) v. Maidstone Manufacturing Inc. (Respondent) (*Withdrawn*)

**3699-92-OH:** William Branton (Applicant) v. Maidstone Manufacturing Inc. (Respondent) (*Withdrawn*)

**3806-92-OH:** Kenneth G. Wauthier (Applicant) v. Mudge's Jumbo New & Used Appliance (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**2588-90-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, on its own behalf and on behalf of its Local Union 463 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro (Respondents) (*Withdrawn*)

**3026-90-G:** Millwrights District Council of Ontario on its own behalf and on behalf of Local 2309 (Applicant) v. Calorific Construction Limited (Respondent) (*Withdrawn*)

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**A Monthly Series of Decisions from the  
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**Employee - Certification - Dependent Contractor - Whether certain drivers engaged by respondent newspapers dependent contractors or independent contractors - Board noting various features distinguishing drivers from other employees of the respondent newspapers - Drivers held to be independent contractors - Certification applications dismissed**

**BEFORE:** *Louisa M. Davie, Vice-Chair, and Board Members W. A. Correll and H. Peacock.*

**APPEARANCES:** *Victoria E. Reaume and Guy Havell for the applicant; F. G. Hamilton, S. C. Raymond and Brenda Biller for the responding party.*

**DECISION OF THE BOARD;** June 28, 1993

1. These applications for certification each raise the issue as to whether certain persons engaged by the Ajax/Pickering News Advertiser ("APNA") and the Oshawa/Whitby This Week ("OWTW") are dependent contractors or independent contractors. By decisions of the Board dated April 24th, 1992 (in the case of the application for certification which pertains to the APNA) and April 28th, 1992 (in the case of the application for certification which pertains to the OWTW) a Board officer was appointed to inquire into and report to the Board concerning this dispute.

2. The officer appointed conducted the usual inquiries and examinations and prepared a report for the Board. The parties were afforded full opportunity to be heard, to examine and cross-examine the witnesses, and to adduce evidence and call additional witnesses. A copy of the officer's report to the Board which includes a transcript of the evidence of the witnesses was provided to the parties. Both parties filed extensive written submissions with the Board. In addition, a hearing was convened on April 21st, 1993 at which time the Board heard the oral submissions of the parties as to the conclusions the Board should reach in view of the officer's report.

3. We have considered the officer's report and the written and oral representations and submissions of the parties. In our view the persons whose status is in dispute in these proceedings are not dependent contractors as that term is defined in the *Labour Relations Act* ("the Act").

4. Section 1(1) of the Act provides that dependent contractors are "employees" for purposes of the Act. The Act defines a dependent contractor as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

5. The purpose and history of the "dependent contractor" provision has been well summarized in previous Board decisions (see, for example, *Algonquin Tavern*, [1981] OLRB Rep. Aug.

1057; *Atway Transport Inc.*, [1989] OLRB Rep. June 540; *Diamond Taxi Cab Association (Toronto) Limited*, [1992] OLRB Rep. Nov. 1143 and the cases referred to therein). We find it unnecessary to detail that purpose and history in this case. Suffice it to say that the Board's jurisprudence demonstrates that it can be quite difficult to distinguish between "dependent" and "independent" contractors.

6. In our view it is essential that an assessment of whether an individual is a dependent or an independent contractor must be made having regard to the context of the industry in which the individual is engaged. For that reason we have found the Board's decisions in *Journal LeDroit*, [1985] OLRB Rep. Sept. 1372 and in *The Citizen*, [1985] OLRB Rep. June 819 to be of particular assistance in our determination. Both of these cases also dealt with newspaper operations and the status of contractor "drivers". In *Journal LeDroit*, the Board determined the drivers to be dependent contractors, while in *The Citizen* the drivers in dispute were found to be independent contractors. Indeed, these companion cases can perhaps be characterized in a more general way as the two outside book ends within which the present dispute falls. On balance, and based on the entirety of the material before us, we have determined that the contractors whose status is in dispute fall more closely to *The Citizen's* independent contractor end of the book shelf.

7. We do not intend to set out an exhaustive review of the evidence in relation to the eleven factors listed in *Algonquin Tavern*, *supra*, which alone or in combination have been utilized by the Board to assist in the determination of this issue. Neither do we intend to quote at length from the Board's decision in *The Citizen* or *Journal LeDroit*. The law in this area is well established and recognizes that inevitably this issue is a factual determination which requires consideration of the particular circumstances of each case. The circumstances before us contain many "grey" areas and for that reason we propose only to highlight those factors which, on balance, have persuaded us that the drivers whose status is in dispute fall on the independent contractor side of the imaginary line which stretches across the continuum of the independent contractor on one side to the dependent contractor on the other side. In so doing we will note some of the circumstances which distinguish this case from both *The Citizen* and *Journal LeDroit* as well as making note of some of the similarities.

8. We note at the outset that Metroland Printing, Publishing and Distributing Limited is the corporate entity which carries on business as APNA and OWTW. For ease of reference therefore throughout our decision we will be referring to the responding party as ("Metroland"). The persons whose status is in dispute will be referred to as either "drivers" or "contractors".

9. The starting point of our determination is the contractors' agreement which each of the persons whose status is in dispute has signed. That agreement is with Metroland and states:

#### CONTRACTOR AGREEMENT

#### BETWEEN

---

division of  
METROLAND PRINTING PUBLISHING &  
DISTRIBUTING DIVISION OF HARLEQUIN  
ENTERPRISES LIMITED

("Metroland")

- and -

---

("Contractor")

WHEREAS Metroland publishes \_\_\_\_\_  
 ("the newspaper");

AND WHEREAS the Contractor is an independent newspaper agent desiring to distribute the newspaper on the terms set forth below;

THE UNDERSIGNED ACKNOWLEDGES AND AGREES

AS FOLLOWS:

1. That the Contractor has undertaken, to effect and be fully responsible for delivery of \_\_\_\_\_ ("the newspaper"), flyers, other publications and products on the route(s) and days outlined in Schedule "B" attached which is part of this Agreement.
2. That the Contractor shall be responsible to take all steps necessary for the prompt and timely delivery of the newspaper, flyers, publications and products on the said route(s) in good condition.
3. That the Contractor shall receive payment for services rendered for Metroland as described in the attached Schedule "A" which is part of this agreement.
4. That the Contractor may engage agents or employees to provide services under this Agreement. The Contractor may sub-contract his route(s) with the permission of Metroland.
5. The Contractor and any employees of the Contractor are not employees of Metroland and shall not be entitled to receive from Metroland any vacation or vacation pay or any other benefits, including employer's contributions for Unemployment Insurance, Canada Pension Plan and Workers' Compensation. The Contractor agrees to obtain Workers' Compensation coverage with respect to any employees who provide services under this Agreement, and the Contractor must provide a "clearance certificate" as proof of such coverage upon the commencement of renewal of this Agreement if any employees will provide services under this Agreement. The Contractor shall have sole responsibility for labour relations relating to its employees and shall be responsible for complying with all applicable legislation relating to its employees.
6. The Contractor hereby indemnifies Metroland from and against all claims, costs or damages of every nature which Metroland may suffer as a result of the negligence of the Contractor, any sub-contractor, or the agents or employees of either in the performance or non-performance of this Agreement.
7. Either the Contractor or Metroland may terminate this agreement by giving the other thirty (30) days' notice of termination in writing.
8. Metroland may terminate this agreement without notice where the Contractor has failed to carry out the terms of this Agreement.

DATED AT \_\_\_\_\_, Ontario

this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

SIGNED, SEALED AND DELIVERED  
 in the presence of

\_\_\_\_\_  
 Contractor

\_\_\_\_\_  
 Witness

\_\_\_\_\_  
 Metroland

\_\_\_\_\_  
 Witness

\*\*\*\*\*

## SCHEDULE "B"

1. Your delivery area will be in the following zones in \_\_\_\_\_.

Zones may be adjusted from time to time, as required by Metroland.

2. DELIVERIES are to be completed by:

Wednesday delivery..... 2:00 p.m.  
 Friday delivery ..... 2:00 p.m.  
 Sunday delivery ..... 2:00 p.m.  
 Off-day distribution (flyer)..... 2:00 p.m.

PICK UPS are to be made by:

Wednesday pick up ..... 9:00 a.m.  
 Friday pick up ..... 9:00 a.m.  
 Sunday pick up ..... 9:00 a.m.  
 Off-day distribution (flyer)  
     pick-up ..... 9:00 a.m.

3. Scheduled times for pick up may be rescheduled due to unforeseen circumstances (ie. late press runs). Distribution times are to be met unless otherwise stipulated by the Distribution Manager.

We note parenthetically that some of the contractor drivers have established independent proprietorships with separate business names. In those instances, the contractor agreement is between Metroland and that business.

10. The existence of this written agreement is one factor which distinguishes this case from either *The Citizen* or *Journal LeDroit*. However, we have not set out the terms of this agreement because it is determinative of the issue before us. To the contrary, we accept counsel for the trade union's submissions that the substance of the relationship between the respondent and the contractors should be looked at and not the form of the agreement. Thus, although we find the existence and terms of this contractor agreement to be a factor which the Board must consider and balance, we do not find the agreement itself to be conclusive of the issue in dispute. We have set out the terms of this agreement however as it captures both the duties and obligations of the persons in dispute, and outlines the financial arrangements between the parties to the contract. These are two factors which we have considered in deciding this matter.

11. The contractors whose status is in dispute are responsible for delivering the product given to them by Metroland (primarily newspapers and flyers) to drop off points along a route established by Metroland. In this instance that primary responsibility also includes:

- (a) the pick up of the product at the employer's warehouse at specified times;
- (b) accurately "counting" the newspapers and flyers prior to their delivery to ensure the appropriate number is delivered to each drop off point; and
- (c) the ultimate delivery of the product by a specified time at specified drop off points.

For providing this service the contractors receive a fairly standard amount of remuneration which is based on the number of papers, flyers etc. delivered.

12. At first blush these obligations and the manner in which they are established tend to suggest a relationship which more closely resembles the relationship of an employee than that of an independent contractor. Metroland controls what is to be delivered and when and where it is to be delivered. Moreover, the evidence discloses that the contractors are required to “count” the product at Metroland’s premises. They are given a schedule or “manifest” of the route to deliver which sets out what Metroland believes is the most expedient order of completing the deliveries.

13. Upon closer examination, however, these factors are less significant than they might first appear when examined in the context of the newspaper industry. As noted in both *The Citizen* and *Journal LeDroit* the newspaper product may be likened to a perishable good. Part of the process of delivering that product must therefore necessarily include getting the product to the consumer at the right time. In addition, although drivers are given a route which outlines the drop off points in a particular order, the evidence discloses that a contractor is not obliged to follow the order set out. The drivers are free to change the order of the drop off locations and are not required to inform Metroland of such changes. On the totality of the evidence it is apparent that Metroland is only concerned that the proper number of items is delivered to the appointed locations by a specified period of time. There is little evidence that Metroland exercises any further control about how the drivers are to perform the work specified in the contractor agreement. On balance therefore we find the factor of control to be mostly a neutral factor with perhaps only a slight shading towards the independent contractor end of the spectrum.

14. The scope of the work involved with delivery of the product is less than the *Journal LeDroit* and *The Citizen* cases where the papers were delivered six days a week. The APNA is produced and delivered three times each week. At the OWTW four papers are produced and delivered each week. In addition to the delivery days for the papers, the evidence discloses that the drivers may count the product on days when they do not deliver newspapers or flyers.

15. The financial arrangements between Metroland and the drivers which are referred to in the contractor agreement more closely resemble those found in *The Citizen* than those found in *Journal LeDroit*. With respect to these financial arrangements we find that although there is evidence of a limited amount of individual negotiation of the rates paid under the agreement (with Metroland generally and unilaterally first setting a standard rate) on balance the financial arrangement set out in the agreement does not unequivocally point to either the dependent or independent contractor direction.

16. The service itself is fairly standardized. A uniform fee structure is not in and of itself determinative in such circumstances. Moreover, on the evidence it is apparent that there is some room for individual negotiation. Similarly, although drivers do not deal with customers directly (nor do they handle any monies relating to customer accounts) and there is little evidence of risk taken by the drivers, the drivers are able to reduce their costs (and increase their profits) by such mechanisms as the ability to freely organize their routes more efficiently, controlling their expenses relating to the delivery vehicles used, and the use and payment of substitute drivers or helpers.

17. Drivers do not receive vacation or vacation pay or any other benefits including employer contributions for Unemployment Insurance, Canada Pension Plan, and Workers’ Compensation. At APNA the drivers invoice Metroland and are paid once per month. At OWTW payments are made weekly. There are no deductions made for Tax, Unemployment Insurance or Canada Pension. Some of the drivers charge the Goods and Services Tax to Metroland on the services they provide.

18. All but one of the contractors provide their own vehicle for delivery. Metroland has had no financial involvement with the contractors (other than paying the amounts set out in the agreement) and in particular does not own and has not financed the vehicles operated by the contractors. All expenses related to the delivery of the product and the maintenance of the vehicles are borne by the contractors. This includes gas, insurance, maintenance, repairs, and license fees. Each of the drivers recognized that their profit was related to their ability to control expenses relating to the delivery of the product and in particular the expenses relating to the operation of their vehicles. For tax purposes most of the contractors deducted these expenses from their revenues. Although the ownership of the tools certainly suggests independence, the Act clearly indicates that factor is also not dispositive of this issue.

19. During the course of the examinations many of the drivers referred to themselves as “employed by” either APNA, OWTW or Metroland and indicated they did not consider themselves as independent business persons. In addition, the evidence discloses a long term stability in the relationship between the drivers and Metroland. Many of the contractors have long service with Metroland (3 in excess of 18 years and most for more than 3 years).

20. This evidence however must be balanced with the fact that in correspondence to Metroland which preceded the filing of these applications and which is signed by a group of the drivers, the drivers refer to themselves collectively as “independent business people like yourselves”. In addition the majority of drivers (and certainly the greater majority of those who filed tax returns) treated themselves as independent or self-employed business persons for tax purposes. Thus, they were able to take advantage of tax laws by claiming various deductions which are not available to employees. These actions are inconsistent with the assertion of employee status. In our view this treatment for tax purposes is some evidence of entrepreneurial activity, affects the ability of the drivers to increase profit and reduce loss, and also distinguishes the drivers from other employees at Metroland.

21. In this latter regard we briefly note some other features which distinguish the drivers from other employees at Metroland. Unlike Metroland employees, the drivers do not fill out employment application forms, do not receive annual performance appraisals, are not subject to Metroland’s discipline policies (although there are certain rules relating to their delivery of the product), receive no training from Metroland, receive no benefits, have no deductions made on their behalf and have no vacation entitlement.

22. Unlike Metroland employees, drivers are not required to notify Metroland if they are sick or will be absent. Their only responsibility is to ensure that the route covered by their agreement is serviced. This latter aspect leads us to the use of substitutes and helpers by the drivers as well as an examination of the evidence as it relates to any practical and legal impediments which may affect the status of the drivers as dependent or independent contractors.

23. As noted some of the drivers have established businesses and it is these independent proprietorships which have entered into the agreement with Metroland. Some of the drivers service more than one route. A number of the drivers have other full-time employment. Thus one driver estimates he works 55 hours per week for another employer and that 60 per cent of that time is spent in the USA and away from the Ajax/Pickering area. Another contractor works 40 hours per week as a transport driver. A third operates a janitorial business, another works in the construction industry, while yet another also works as a mechanic. As a result of these types of factors the evidence discloses that it is not unusual for the drivers to have “helpers” to assist them, or to use “substitutes” to cover the run either on a regular basis or on those occasions when they are sick

or wish to have some time off. The majority of drivers use family members (spouses, children, siblings) as helpers or substitutes on those occasions although that is not an exclusive practice.

24. The evidence as to whether Metroland's "approval" is required before a substitute or helper is used, and the involvement of Metroland in providing coverage for either "drivers" or "counters" is mixed. Generally the drivers indicated that they advised Metroland if another driver was going to drive the route or count the product. There is no suggestion in the evidence however that Metroland is involved in arranging for such coverage. Neither is there any evidence that Metroland has ever disapproved of, or otherwise refused the use of any such substitute or helper by the contractor. It is also not clear that all drivers advise Metroland with respect to the use of substitutes. On balance, having regard to the entirety of the evidence we have determined that the evidence can be placed no higher than that Metroland merely wants to be kept informed as to who will be responsible for providing services required under the agreement at any time. As a result, we find the fact that the drivers generally inform Metroland when they are unable to perform the duties and that a replacement will be utilized not to be very significant.

25. The evidence clearly discloses that the contractors are responsible for paying substitutes or helpers. On the other hand there is evidence that the practice is to pay substitutes the same rates as the drivers themselves receive from Metroland. That portion of the evidence suggests that the use of someone else's labour by the drivers is not designed to increase the drivers' own profit. Although the factor of profiting from someone else's labour would point towards independent contractor status, the situation before us is not so clear. In addition, and at least insofar as OWTW is concerned, if a driver chooses to use another person to "count" the product, that counter is chosen by the contractor from a list provided by Metroland.

26. We have determined that on balance the factor which focuses on the use of, or the right to use, substitutes points towards independence in the circumstances before us. As the jurisprudence repeatedly notes it has generally been considered inconsistent with an employment relationship if a contractor is able to fulfill the agreement with someone else's labour rather than the contractors own work and skill. The fact that some of the drivers regularly use others to perform all or significant portions of their obligations under the agreement (ranging from all or some of the counting, to all and some of the driving, to and all or some of both) is a factor which points strongly towards independent contractor status. In the circumstances before us, the fact that the substitute or helper is often a family member and the fact "profit" is not necessarily made from the use of such labour does not significantly alter that fact. The fact remains that another individual's labour is used to perform the agreement. Certainly, the evidence with respect to the use of helpers and substitutes, and the existence of other full time employment is a much stronger indicator of independence in the evidence before us than the facts as set out in either *The Citizen* or the *Journal LeDroit* decisions.

27. With respect to the practical and legal impediments in the relationship which affect the drivers' status the evidence is also mixed primarily because not all contractors personally perform the duties set out in their agreement. Thus, although some of the drivers spoke of work weeks that exceeded 30 hours per week, some of the other drivers did not work any hours performing the duties set out in their agreement, while others indicated they spent less than 12 hours a week performing duties set out in their agreement. Some of the contractors who testified about spending a significant number of hours working at or for Metroland were persons who had been engaged by other contractors to do either some or all of that other contractor's "counting" of the product and some or all of that contractor's driving of the route. For that work they would be paid by the other contractor and not Metroland. In those circumstances it may not be entirely accurate to characterize the obligations of the agreement as a full-time job.

28. On balance we have concluded that the number of hours required to fulfill the agreement does not practically impede the economic mobility and independence of the drivers. Neither is there any legal impediment which restricts the contractors scope of activity. Although the contractors are restricted from delivering other products *while* they are delivering Metroland products, there is no impediment which restricts the contractor from delivering other products at other times, or which prevents contractors from doing other jobs. Exclusivity of labour is not a part of the relationship between Metroland and these drivers.

29. In the circumstances before us it simply can't be said that the economic dependence, if it exists at all, flows from the terms and conditions between the contractors and Metroland. Some of the contractors have other full-time jobs or businesses. Many use others to fulfill all or part of their agreement. The degree of economic dependence, if it exists at all, is far less than that noted by the facts in *Journal LeDroit*.

30. With the exception of one driver whom the applicant admitted was an independent contractor there is little evidence of entrepreneurial activity in the sense that drivers do not advertise their services, do not solicit clients etc. On the other hand, it is also to be noted that drivers do not wear company uniforms, and do not have company logos affixed to their vehicles.

31. Finally, we have already referred to the factors which distinguish these contractors from other Metroland employees. We also find it useful to compare the contractors whose status remains in dispute with the one contractor whom the applicant agrees is an independent contractor. Although there are a number of differences between that clearly independent contractor (the operation of a cartage or delivery business, the use of a business card, the hiring of others) there are also a number of significant similarities which go to the heart of the relationship between Metroland and the drivers. Thus, this independent contractor operates under identical terms and conditions as all the other contractors. For example he uses his own vehicle, is paid in the same manner and on the same basis as the other contractors, and like a number of other contractors this independent contractor also hires another person to do the counting.

32. In the result therefore and on balance having regard to all of these factors we find that the contractors whose status is in dispute in these applications are independent contractors and are not dependent contractors within the meaning of section 1(1) of the Act. Accordingly, these applications for certification are dismissed.

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**3770-92-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Burns International Security Services Limited, Responding Party**

Bargaining Rights - Bargaining Unit - Certification - Security Guards - Union applying to represent employees of security firm - Union urging Board to follow established practice for single location operations of describing bargaining units with reference to the relevant municipality, rather than the specific location where employees work - Security firm's only business activity within municipality at single manufacturing plant - Employer arguing that collective bargaining would be better served if scope of unit were congruent with existing commercial reality - Employer proposing site-specific bargaining unit and submitting that section 64.2 of the *Act* answers any concerns about

**about fragility of site-specific bargaining rights - Board finding municipal unit appropriate - Certificate issuing**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

**APPEARANCES:** *Craig Grant* and *Raj Dhaliwal* for the applicant; *Luc Ferland*, *Richard Nixon* and *Toni-Anne Dasent* for the responding party.

**DECISION OF THE BOARD;** June 18, 1993

1. This is an application for certification.
2. For ease of exposition, the parties in this matter will be referred to in abbreviated form as “the union” and “Burns”.
3. The parties are agreed, and the Board finds, that the application is timely, and that the applicant is a “trade union” within the meaning of the Act.
4. The parties do not agree on the description of the unit of employees appropriate for collective bargaining.
5. The union urges the Board to follow its well established practice for single location operations of describing bargaining units with reference to the relevant municipality, rather than the specific location where employees work, lest the change in that location or (as in this case) a cancellation of a particular commercial contract undermine or constrain employees’ collective bargaining rights. (See: *Best Cleaners and Contractors limited*, [1988] OLRB Rep. Nov. 1143 and *T.R.S. Food Services Limited*, [1980] OLRB Rep. April 542). A broader based bargaining unit would better accommodate the potential ebb and flow of the company’s business. It enhances the likelihood that any reorganization of work, employees or commercial activity will take place within the scope of the bargaining unit.
6. At the present time, the company’s only business activity in Hawkesbury is at the P.P.G. plant. However, the company submits that, elsewhere, it provides security services to a wide variety of customers including factories, office buildings, commercial complexes and promoters of “special events”. In each case the services are tailored to the needs of particular customers, and are developed, promoted and priced accordingly. For example, the package of services supplied to a manufacturer will be different from that supplied to a shopping centre or special event, with the result that employees may have different duties and responsibilities, different reporting relationships, different hours of work, a different shift schedule (seven days a week, weekends only, etc.) and different wages. There may also be a different or fluid mix of full-time and part-time employees.
7. The company submits that its ability to successfully acquire such work in Hawkesbury may be impeded by a bargaining unit which extends municipal wide, but a collective agreement that, in practice, would be negotiated in relation to the small existing group of employees working at P.P.G. A collective agreement negotiated to fit that commercial relationship might well be inappropriate for others; moreover, section 64.2 of the Act now answers any concerns about the inherent fragility of either site-specific bargaining rights or bargaining rights, rooted in a particular service contract.
8. Counsel submits that the process of collective bargaining would be better served if the

scope of the bargaining unit where congruent with the *existing* commercial reality: a small group of employees at the P.P.G. plant that will negotiate in the shadow of the C.A.W. collective agreement, and might, in other circumstances, have been regarded as a kind of “tag end” to that unit. A broader based bargaining unit would create problems at the bargaining table and create commercial difficulties when the company seeks to bid for new work. Counsel submits that if there were other employees in Hawkesbury (unorganized), the Board would confine the bargaining rights to the P.P.G. site because those employees would be considered to have a separate community of interest; moreover, if the company does employ others, they will have a different interest because of the different location and terms of employment.

9. For the purpose of completeness we might note that broader geographically based bargaining units are not uncommon in this industry, and for this particular employer. The Board has found both kinds of unit to be appropriate. In fact, the Board has recently found to be appropriate bargaining units consisting of employees of the responding employer in these municipal areas: the Regional Municipality of Ottawa Carleton (Board File No. 3500-92-R); the Regional Municipality of Hamilton Wentworth, together with the Town of Milton, the Town of Haldimand, the City of Burlington, the City of Niagara Falls, the City of St. Catharines, the Town of West Lincoln and the Town of Grimsby, (Board File No. 2546-92-R); the Counties of Wellington and Brant and the Regional Municipality of Waterloo (Board File No. 1681-92-R); the County of Lambton (Board File No. 1172-92-R); the County of Essex (Board File No. 2612-91-R); the County of Kent (Board File No. 1987-91-R); the City of Peterborough (Board File No. 1234-88-R); and the Counties of Middlesex, Huron and Oxford (Board File Nos. 0389-92-R, 4117-91-R). None of these certificates is site-specific.

10. We do not know the particular facts or party agreements which underlie these bargaining unit determinations. What can be said is that for this employer, the Board has routinely found to be appropriate, broadly based municipal groupings - whatever the mix of contracts and customers might have been in each geographic area. The Board has not issued multiple site, or multiple “customer specific” certificates.

\* \* \*

11. Having considered the parties’ representations, the Board sees no reason in this case to depart from its well established practice of describing bargaining units in respect of municipal boundaries where, as here, the employer has but one location in such municipality. Indeed, to apply that approach in this case would not only be consistent with established practice, but would also continue a pattern of geographic bargaining units which is already emerging in this employer’s own organization. And, insofar as Hawkesbury is concerned, the problems adverted to by counsel are, at this stage, entirely hypothetical, and can be substantially moderated through the process of collective bargaining.

12. It is unnecessary for us to comment on the scope of section 64.2 of the Act which came into effect in January 1993 or indeed, the potential impact of the Board’s power to combine bargaining units. It suffices to note that section 64.2 and section 7 were necessary precisely *because* of the problems associated with narrow or site-specific bargaining units, and it is not at all clear that this remedial legislation provides a complete answer to those problems.

13. In summary, despite the thoughtful and intriguing arguments of counsel for the employer, it is our opinion that in all the circumstances of this case the unit proposed by the trade union is appropriate for collective bargaining, and that the difficulties raised by the employer can be appropriately addressed and accommodated at the bargaining table. They are not sufficiently

serious to warrant restricting the bargaining unit description in the way proposed by the responding party.

14. Having regard to the foregoing, the Board finds that the unit of employees appropriate for collective bargaining should be described as follows:

all security guards employed by Burns International Security Services Limited, in the Town of Hawkesbury, save and except supervisors, and persons above the rank of supervisor.

15. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on March 25, 1993, the certification application date, had applied to become members of the applicant on or before that date.

16. A certificate will issue to the applicant.

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### **3367-92-U Commercial Graphics Limited, Applicant v. Graphic Communications International Union, Local 500M, Responding Party**

**Duty to Bargain in Good Faith - Unfair Labour Practice - Employer alleging that union proposal regarding desk top publishing comprising bargaining unit scope provision and that union's intention to take issue to impasse violating duty to bargain - Employer also alleging that modified proposal made after employer's complaint to the Board amounting to penalty which union sought to impose on employer for filing bad faith bargaining complaint - Complaints dismissed**

**BEFORE:** *Susan Tacon*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

**APPEARANCES:** *W. J. McNaughton* and *G. Ball* for the applicant; *J. James Nyman* and *Earl McDonnell* for the responding party.

#### **DECISION OF THE BOARD; June 23, 1993**

1. This is a complaint by Commercial Graphics Limited ("the company" or "Commercial") that the responding party, the Graphic Communications International Union, Local 500M (the "union") contravened section 15 of the *Labour Relations Act* by allegedly bargaining to impasse a scope and recognition clause different from that found in the collective agreement. The hearing was scheduled on an expedited basis on the request of the company on the ground that such expedition was appropriate given the nature of the allegations and the impending strike deadline.

2. At the hearing, the parties agreed on a statement of facts, obviating the need for *viva voce* testimony. The parties made their submissions, after which the Board ruled as follows:

Having regard to the submissions of the parties, in the context of the agreed statement of facts, the Board is persuaded that it is appropriate to give the following ruling, with reasons to follow.

- (a) With respect to whether the "original" proposal (including the desktop memorandum) constitutes a contravention of section 15 of the Act, the Board reserves its decision.

- (b) Even assuming, without deciding at this juncture, that the original proposal did constitute a contravention of section 15, the Board is satisfied, in the circumstances, including the historical context and the union's rationale as expressed in the agreed statement of facts, that the second proposal does not constitute a violation of section 15 nor does that proposal comprise a penalty imposed on the company for filing the section 15 complaint with regard to the original proposal.

3. This decision provides the reasons for the Board's oral ruling. It is appropriate to reproduce the agreed statement of facts and then outline the representations of counsel in an abbreviated form.

4.

#### AGREED STATEMENT OF FACTS

1. The Applicant (hereinafter referred to as "Commercial") and the Responding Party (hereinafter referred to as "Local 500M") are parties to a collective agreement with an effective date of January 1, 1990 and a nominal expiry date of December 31, 1991.
2. The parties have had a longstanding collective bargaining relationship.
3. Commercial is a trade shop engaged primarily in press preparation and related work.
4. Pattern bargaining is a characteristic feature of the unionized sector of the printing industry in Ontario. The pattern is generally set through negotiations between Local 500M and the Council of Printing Industries of Canada (hereinafter referred to as the "CPI") which represents a large number of employers engaged in all aspects of the industry.
5. Once the pattern has been established by the CPI collective agreements or agreements entered into with other major players in the certain specialty sectors of the industry, historically the pattern has then been picked up in collective agreements by "independent" employers.
6. Commercial is an independent. It has always entered into a collective agreement mirroring in all respects the pattern established through the CPI and other major employers.
7. In the late 1980s rudimentary desk top publishing systems were introduced into the industry by a number of employers often through separately incorporated entities or under distinct business styles. Local 500M responded to their introduction by asserting that desk top systems were covered by the comprehensive work jurisdiction clauses contained in their various industry agreements.
8. The CPI and Local 500M were parties to a collective agreement which nominally expired on December 31, 1989. Commercial and Local 500M were parties to a collective agreement which also nominally expired on December 31, 1989 and which mirrored in all respects the aforementioned CPI/Local 500M collective agreement.
9. In bargaining for a renewal of the aforementioned CPI/Local 500M collective agreement, Local 500M asserted its jurisdiction over desk top publishing. The CPI and Local 500M were unable to reach an agreement substantively resolving the desk top issue.

Eventually the parties executed a memorandum of agreement resolving all issues relating to the renewal of the collective agreement. That memorandum disposed of the desk top issue by creating a special subcommittee which was to meet within forty-five (45) days of ratification of the collective agreement to discuss and substantively resolve the desk top issue. Failing resolution within the subcommittee either party had a right to submit the matter to an Arbitrator pursuant to an expedited procedure for final and binding resolution of the dispute.

10. The aforementioned memorandum of settlement between the CPI and Local 500M was ratified. The collective agreement was operative from January 1, 1990 to December 31, 1991. (See Book of Documents, *Tab 1.*)
11. Following ratification of the CPI/Local 500M collective agreement Local 500M formally commenced negotiations with each of the independents including, *inter alia*, Commercial.
12. Commercial by this time had introduced into its operation a desk top system which it was operating under the trade name "Darkhorse".
13. The CPI/Local 500M collective agreement was executed on August 1, 1990. On September 24, 1990 Commercial and Local 500M executed a collective agreement the terms of which were identical to those set out in the CPI/Local 500M collective agreement. This agreement was operative from January 1, 1990 to December 31, 1991. The agreement contained a clause which tied resolution of the desk top issue at Commercial to resolution of the issue with the CPI. (See, Book of Documents, *Tab 2.*)
14. The subcommittee established under the CPI/Local 500M collective agreement met to discuss the desk top issue. These discussions ultimately extended without resolution into negotiations for a renewal of the collective agreement.
15. In the late fall of 1991 Local 500M gave the CPI notice to bargain. At approximately the same time notice to bargain was given to the Independents including, *inter alia*, Commercial. As in the past the Independents including, *inter alia*, Commercial and Local 500M placed in abeyance commencement of formal bargaining pending completion of the negotiations between the CPI and Local 500M.
16. Desk top publishing was a dominant issue in the CPI/Local 500M bargaining for renewal of the collective agreement. In late August 1992 after numerous bargaining sessions a memorandum of agreement was entered into resolving all issues including the desk top publishing issue. This memorandum of agreement was subsequently ratified. The collective agreement is operative from January 1, 1992 to December 31, 1993.
17. The aforementioned collective agreement contains a separate Memorandum of Agreement covering desk top publishing, confirming Local 500M's jurisdiction over same and encompasses all desk top operations of an employer wherever performed including operations carried out under a separate corporate vehicle or business style. (See, Book of Documents, *Tab 3.*)
18. Following ratification of the aforementioned collective agreement Local 500M completed negotiations with the four (4) dominant trade shops in the industry. Desk top issues as in the case of the CPI/Local 500M were resolved through a separate Memorandum of Agreement which while not identical to is nevertheless substantially similar to the Memorandum contained in CPI/Local 500M collective agreement. The remainder of the collective agreement mirrors the CPI/Local 500M collective agreement.
19. On or about November 15, 1992 Local 500M commenced formal negotiations with Commercial. Mr. Earl McDonnell at this meeting tendered Local 500M's proposals. The proposal consisted of the CPI/Local 500M collective agreement and the desk top Memorandum agreed to by the four (4) dominant trade shops. Commercial's spokesperson complained about the desk top proposal initially maintaining that Darkhouse [sic] was a separate entity and asserting that Darkhouse's [sic] operation was not encompassed by the jurisdiction clauses contained in the Commercial/Local 500M collective agreement. (See, Book of Documents, *Tab 4.*)
20. On or about December 2, 1992 Local 500M requested the appointment of a conciliation officer.
21. On or about February 15, 1993 the parties met at conciliation. Commercial's spokes-

person again complained about the desk top memorandum asserting that Local 500M was bargaining in bad faith.

22. Mr. McDonnell requested that the Officer issue a Report. Commercial's spokesperson requested that Mr. McDonnell agree to delay the Report pending a contemplated Board proceeding. Mr. McDonnell refused to agree to a delay in the issuance of the Report.
23. On February 16, 1993 Mr. McDonnell was served with the instant Application.
24. On or about February 18, 1993 Mr. McDonnell received a telephone call from Mr. Gary Ball, President of Commercial inviting him to a meeting that afternoon to discuss matter [sic].
25. Mr. McDonnell met with Mr. Ball. Mr. Ball continued to maintain that the work involved was beyond the purview of Local 500M's jurisdiction.
26. The meeting concluded with Mr. Ball and Mr. McDonnell agreeing that Mr. McDonnell along with a Local 500M expert in desk top publishing would attend at Commercial's premises on February 19, 1993 and view the desk top operation.
27. On February 19, 1993 Mr. McDonnell along with a desk top instructor from the Local 500M training school attended at Commercial's premises. They saw four (4) persons performing desk top functions. In each case, in the opinion of Local 500M's representatives, Mr. McDonnell and the instructor, the work performed fell within Local 500M's jurisdiction. Mr. Ball agreed some of the work fell within Local 500M's jurisdiction but went on to claim that other functions performed on the system did not fall into Local 500M's jurisdiction.
28. Mr. McDonnell then advised Mr. Ball that he had a new proposal. Because the desk top resolution had been key to a resolution of the CPI/Local 500M collective agreement and because in order to obtain a satisfactory resolution of the desk top issue it had been necessary for Local 500M to concede its bargaining position on other issues and because Commercial had historically simply tracked the CPI/Local 500M collective agreement and because it no longer was prepared to do so, Mr. McDonnell was not prepared to give to Commercial the CPI/Local 500M collective agreement without the desk top Memorandum. Accordingly, Mr. McDonnell's new proposal contained terms which differed from those agreed upon with CPI including the duration of the proposed collective agreement. Additionally, the proposal carved out the desk top issue making it subject to *Section 64* and *Subsection 1(4)* proceedings and the grievance/arbitration provisions under the collective agreement. (See, Book of Documents, *Tab 5*.)

\* \* \*

Mr. McDonnell will say:

1. Only Commercial and one (1) other employer for whom Local 500M holds bargaining rights covering pre-press operations has refused to sign either the desk top memorandum negotiated with the C.P.I. or the memorandum negotiated with the four (4) major trade shops.
2. Mr. McDonnell's proposal made on February 19, 1992 was not made to penalize Commercial for its refusal to accept its earlier desk top proposal or for its complaint with the Board.
3. His proposal was made to ensure an opportunity to return to the bargaining table as soon as possible to deal with job security issues flowing from the impact of desk top operations. Desk top systems carry the potential to virtually eradicate pre-press operations historically performed by Local 500M's members. Prior experience at Metro-land Printing and Publishing led Mr. McDonnell to believe that litigation before the

Board and under the collective agreement might encompass several years. Additionally, maintenance of the pattern established with Commercial probably would mean a return to the bargaining table in late 1994 or early 1995. In light of the rapid advancement of desk top technologies Mr. McDonnell simply was not prepared to wait another twenty (20) months to two (2) years to return to bargaining.

4. The CPI and trade shop (4 majors) collective agreement contained severance improvements. These were negotiated against the backdrop of the agreement covering desk top and in realization that even with the desk top agreement significant job loss would ensue. Moreover these desk top agreements contained training provisions providing redundant employees with access to desk top jobs with the employers responsible for retraining. The absence of a desk top agreement at Commercial in Mr. McDonnell's view significantly impacted upon the employment security and opportunity of Local 500M's members at Commercial and he was not prepared to leave these members unprotected for up to two (2) years without returning to the table to negotiate severance, and other job security issues while litigation was ongoing to determine the desk top issues.

5. Counsel for the applicant company reviewed the jurisprudence in support of his assertion that the Board has consistently held that a party which presses to impasse an issue of the bargaining unit description thereby violates section 15 of the Act. In counsel's view, the trade union clearly indicated its intention to take to impasse what the parties referred to as the "desk top memorandum". That, it was asserted, in the context of the industry and the collective agreement, comprises the bargaining unit scope provision. Apart from the desk top memorandum, the company was prepared to accept the remainder of the collective agreement provisions. Further, when the company filed its section 15 complaint, the union tabled a second proposal which removed the desk top memorandum but altered the term of the collective agreement from that in the first proposal and made the desk top issue subject to section 64 and 1(4) proceedings and the grievance/arbitration provisions in the collective agreement. Counsel argued that the second proposal was "tailor-made for rejection" and, thus, constituted bargaining in bad faith as well as a violation of section 71. That is, the trade union was seeking to penalize the company for exercising its right to resort to the Board in resisting the "illegal" demand of the union. The appropriate remedy, it was contended, included declarations that the union breached the sections noted and a direction that the union "retable" the first proposal without the desk top memorandum. At that point, counsel indicated there would be no items remaining in dispute and the collective agreement would be settled. The union would still be free to litigate the 64/1(4) issue and/or arbitrate the matter. Cases cited in support included: *Graphic Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221; *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136; *Brantford Expositor*, [1988] OLRB Rep. July 653; *The Wellington County Separate School Board*, [1992] OLRB Rep. Oct. 1128.

6. Counsel for the respondent trade union reviewed the factual and historical context of bargaining in the industry and with the company in support of his assertion that, in that context, neither the initial nor the modified proposal of the trade union contravened the obligation to bargain in good faith. In the past, it was argued, the company had accepted the collective agreement negotiated between the trade union and the Council of Printing Industries (CPI). The current round of bargaining produced the "desk top memorandum"; the union had no reason to believe the pattern historically followed would now be rejected by the company. Counsel acknowledged that a party cannot bargain a recognition provision to impasse but characterized the clauses in dispute as going to work assignment, not recognition. Further, counsel stressed that the Board has not adopted the approach in the American jurisprudence of "mandatory" and "permissive" categories of bargaining proposals. It was submitted the first proposal, given the Board's caselaw, did not contravene section 15 of the Act. Once the company rejected the pattern settlement, the union was entitled to revise its offer, provided the modified proposal reflected, as here, it was argued,

the legitimate interests of the union and its members. The union was prepared to litigate the 63/1(4) question before the Board and/or arbitrate the issue but not in the context of the duration clause in the initial proposal. Counsel contended the sequence of events did not sustain a finding the second proposal constituted a “penalty” imposed on the company for filing the section 15 complaint. In the alternative, counsel asserted the remedy sought was not appropriate as that would permit the company to “cherry pick” amongst the clauses in the pattern agreement, to sever the historical pattern without bearing any of the usual collective bargaining consequences. Cases referred to: *Toronto Star Newspapers Limited*, [1979] OLRB Rep. Aug. 811 (the Burkett panel); *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451 (the Carter panel).

7. The issue for the Board to determine is whether the trade union, through its original and modified proposals, contravened the duty to bargain in good faith and/or sought to impose a penalty on the company for exercising its right to file the instant complaint with the Board. In determining that question, the Board commences its analysis with the proposition clearly established in the jurisprudence, and not in dispute between the parties, that a party may not bargain to impasse the scope or recognition provisions of a collective agreement. The definition of the bargaining unit may be the subject of collective bargaining and may be altered on agreement of the parties. However, the resort to economic sanctions by either party to achieve an expansion or diminution of bargaining rights from those established by certification or voluntary recognition is precluded: *United Brotherhood of Carpenters and Joiners of America*, [1978] OLRB Rep. Aug. 776; *Toronto Star*, [1979] OLRB Rep. Aug. 811; *Burns Meats*, [1984] OLRB Rep. Aug. 1049; *Cybermedix Limited*, [1981] OLRB Rep. Jan. 13; *Brantford Expositor*, *supra*; *The Wellington County Separate School Board*, *supra*. Likewise, the parties may not bargain to impasse an issue of work jurisdiction given the statutory vehicle of section 93 for determining such conflicts: *Toronto Star Newspapers Limited*, [1979] OLRB Rep. May 451 (the Carter panel); *Toronto Star Newspapers Limited*, [1979] OLRB Rep. Aug. 811 (the Burkett panel); *Brantford Expositor*, *supra*. The Board has recognized that, in the context of craft unions and bargaining units organized along craft lines, questions of work assignment and jurisdiction or recognition are not as clearly demarcated as in other sectors: *Toronto Star Newspapers*, *supra* (the Carter panel); *Toronto Star Newspapers*, *supra* (the Burkett panel); *Brantford Expositor*, *supra*. While acknowledging that, in craft units, work assignment changes impact upon representational rights, the two concepts are not identical. As noted, jurisdictional disputes must not be resolved through resort to economic sanctions. Parties, however, are free to take to impasse matters of work assignment including, for example, the protection of bargaining unit work through a prohibition of subcontracting or the performance of that work by other non-bargaining unit employees. The Board examines the particular factual context and collective agreement in each case to determine the appropriate characterization of the dispute.

8. The Board next turns to an evaluation of the facts in the instant case, first with respect to the original proposal and then the modified proposal of February 19, 1993. A salient feature of the collective bargaining relationship between the trade union and Commercial is the fact that the parties have awaited the outcome of pattern bargaining in the industry and then have utilized that outcome to settle their specific collective agreement. As noted in the Agreed Statement of Facts, pattern bargaining is a characteristic feature of the unionized sector of the printing industry in Ontario. The pattern is established through negotiations between the union and the Council of Printing Industries of Canada (the “CPI”) and, subsequently, mirrored in the collective agreements between the union and each of the independent trade shops, including Commercial. The process of collective bargaining between the union and the other independents has also traditionally awaited the resolution of the “pattern agreement”. Such a bargaining process is not unique to the printing industry and represents a sensible manner of negotiating collective agreements in such circumstances.

9. Such a format for bargaining does, however, create what might be referred to as a “lag time” in finalizing the collective agreements with the independents, in particular. For example, the CPI and union collective agreement which was effective from January 1, 1990 to December 31, 1991 was executed on August 1, 1990. The mirror collective agreement between Commercial and the union was executed on September 24, 1990. Again, that is not an unusual chronological framework in pattern bargaining situations. In practical terms, however, the parties may well finalize one collective agreement relatively close to its expiry date. The Board will return to that aspect of the relationship between these parties later.

10. Technological change is an issue with particular resonance in the printing industry. It is not in dispute that, in the late 1980's, rudimentary desk top publishing systems were introduced by a number of employers, often through separately incorporated entities or under distinct business styles. The union asserted that desk top systems were covered by the comprehensive work jurisdiction clauses in the collective agreements. In the negotiations between CPI and the union leading to the 1990-91 collective agreement, the parties could not substantively resolve the desk top issue but referred the matter to a special subcommittee. Failing resolution within the subcommittee, either party could refer the matter to arbitration. Following ratification of the CPI/union agreement, negotiations commenced with the independents, on an individual basis, including Commercial. By this time, Commercial had introduced a desk top system operated under the trade name “Darkhorse”. The collective agreement between the union and Commercial, effective for 1990-91, expressly ties resolution of the desk top issue at Commercial to resolution of the issue with CPI. The subcommittee's deliberations were not successful and, essentially, the discussions were folded into negotiations for the renewal agreement to take effect January 1, 1992.

11. That round of negotiations with CPI began in the Fall of 1991. While notice to bargain was given to the independents, as in the past, those negotiations were held in abeyance. In August, 1992, a collective agreement was finalized, and later ratified, between CPI and the union. Its duration was January 1, 1992 to December 31, 1993. The desk top issue was resolved in what was referred to as the “desk top memorandum”. Negotiations then formally commenced with the independents; the four dominant trade shops signed collective agreements mirroring the CPI agreement. With respect to the desk top issue, the memoranda of agreement were substantially similar, albeit not identical, to that in the CPI agreement.

12. In the negotiations between the union and Commercial, however, the company resisted the desk top memorandum, asserting that Darkhorse was a separate entity not encompassed by the jurisdiction clauses in the collective agreement. Negotiations proceeded to conciliation on February 15, 1993, where the company asserted that the union was bargaining in bad faith. The union refused the company's request to delay the “no board” report pending a contemplated Board proceeding. The instant application was filed with the Board and served on the trade union on February 16, 1993.

13. It is useful to set out, in part, the provisions regarding desk top publishing in the initial proposal presented to Commercial by the union.

Memorandum of Agreement - Desktop Publishing

1. JURISDICTION: As present agreement which includes Technician I and II for all companies involved in this set of negotiations.
2. All companies listed in this agreement whose employees are doing our work on desk-top which are upstairs, downstairs, across the street or in other areas, which are allied with the above mentioned companies, are to be in the union and covered under the current agreement in effect.

The remaining sections of the desk top proposal deal with the matter such as retraining, desk top ratio, definitions, wages, hours of work and apprentices.

14. Counsel for Commercial contends this proposal broadens the jurisdiction or recognition of the union by sweeping in the Darkhorse operation and, consequently, violates the section 15 duty in that the union is bargaining such an issue to impasse. Counsel for the trade union portrays the issue as one of work assignment with respect to which the union is entitled to resort to economic sanctions. In the Board's view, while the question is problematic and close to the line, the latter characterization is more compelling. As is evident from the proposal quoted above, the jurisdiction provisions of the collective agreement have not been altered from the prior agreement. What is different is that the proposal seeks to affirm that desk top work or assignments fall under the existing jurisdictional clauses in the collective agreement. The memorandum stipulates that that result obtains whether or not the employees doing the work are "upstairs, downstairs, across the street or in other areas, which are allied with the above mentioned companies". In some respects, the proposal resembles a "no subcontracting" clause albeit one which limits the company in shifting the work outside the bargaining unit to other of its employees, even those in its "allied" operations. In the instant case, the proposal would encompass the Darkhorse operation. As noted in the agreed facts, Commercial operated its desk top system under the trade name Darkhorse. While the result might be that the Darkhorse employees are covered by the collective agreement, that result flows from the work those persons were doing and the nature of the Commercial -Darkhorse relationship, namely, that Darkhorse is a trade name for part of Commercial's business. The instant situation is not precisely the same as those wherein the Board has held that one party was seeking, through the threat of economic sanctions, to force an expansion or diminution of the bargaining unit.

15. It is important to note that the instant facts do not involve a jurisdictional dispute in the guise of bargaining. In view of the agreement on facts, it appears there is no other union competing for the work in question. Nor was it asserted that this was, in reality, a jurisdictional dispute which should be resolved through section 93. Further, it must be remembered that the desk top dispute resulted from advances in technology impacting upon the traditional way in which the functions performed by the employees in the bargaining unit may be carried out. The Board is not persuaded that bargaining to impasse over the impact of technological change, at least in the instant circumstances, is tantamount to seeking to utilize economic sanctions to expand or contract a bargaining unit contrary to the duty to bargain in good faith, as elaborated in the Board's case law.

16. The Board does not disagree with the analysis in *Burns Meats Ltd.*, *supra*, wherein the Board found that the union's attempt to bargain beyond the scope of the local bargaining rights and beyond the Province of Ontario contravened the section 15 duty even though the parties had historically bargained nationally. In the instant case, the union is relying on the traditional pattern bargaining in developing the context for the specific negotiations with Commercial. It is appropriate to note this distinction at this juncture given the Board's comments herein on the implications of pattern bargaining on the Board's assessment as to whether a breach of the duty to bargain in good faith has been made out and, if so, what are the resultant remedies.

17. For the reasons given, the Board finds that the original proposal did not contravene section 15 of the Act. However, in the alternative, even if the Board concluded that the original proposal did so violate the duty to bargain in good faith, the Board would not regard it as appropriate to direct any remedy for such breach and, in particular, the relief sought by the company for reasons outlined below.

18. To return to the chronology of events, Commercial sought to delay the "no board"

report, the issuance of which, according to statute, triggers the “countdown” to the date on which the resort to economic sanctions becomes timely. The union refused to agree to that delay, nor was there any obligation to do so. The company then filed the instant complaint on February 17, 1993. The parties viewed the desk top operation on February 19, 1993. In the opinion of the union’s representatives, including the desk top instructor from the union’s training school, the work performed by the four employees fell within the union’s jurisdiction. The company’s representative agreed that some of the work performed fell within that jurisdiction but asserted that other functions performed on the system were not so included. Further, the union tabled a new proposal which carved out the desk top issue, leaving that to be determined by section 64 and 1(4) proceedings and the grievance/arbitration provisions.

19. Counsel for Commercial argued that the tabling of the second proposal constituted a further instance of bad faith bargaining, a proposal “tailor made for rejection”, and a penalty which the union sought to impose on the company for exercising its right to file the instant complaint. In the Board’s view, the modified proposal is neither.

20. Collective bargaining is a fluid and dynamic process, the end product of which, if the process is successful, is the signing of a collective agreement. The Board has recognized, as noted earlier, that a party may seek to persuade its counterpart to agree to a modification of the bargaining unit defined by a certificate or voluntary recognition. A party may not press that issue to impasse. In the instant case, the union could reasonably expect, given past practice, that the company would “pick up” the pattern settlement negotiated between the CPI and the union. It was not unreasonable for the union, in those circumstances, to have insisted on the pattern agreement up to the point the strike deadline was imminent. That point was not reached in this case, given the filing of the bad faith bargaining complaint by the company on February 17, 1993. The Board is not suggesting that a party cannot file such a complaint until the last possible moment. Certainly, the prospect of a looming strike deadline influenced the Board’s decision to expedite the hearing so as to afford the parties a decision prior to the resort to economic sanctions. On the other hand, the Board is not naive about the use of complaints as tactical devices nor of the salutary impact the filing of a complaint may have on a party’s position. The Board does not regard it as helpful to the labour relations community, particularly in the context of negotiations, to be so fixated upon the date on which an application is filed that subsequent conduct is ignored. To do so, would sanction the litigation of matters which may well have become moot by the time of the hearing. Such an outcome is not desirable nor useful for the immediate parties to the dispute nor to the broader community. The Board may well view conduct subsequent to the filing of a complaint with circumspection, even suspicion, given the opportunity for self-serving evidence. But, the Board may have regard to that conduct in determining the issues in the complaint, including the question of the appropriate remedy, if any, for a violation.

21. As the Board held in *Royal Conservatory of Music*, [1985] OLRB Rep. Nov. 1652, a refusal to continue negotiations following the filing of an unfair labour practice complaint and pending disposition of that complaint by the Board may, of itself, constitute a further contravention of the duty to bargain in good faith. The following excerpts from that decision are apposite:

41. ...there are sound labour relations reasons for requiring parties to continue bargaining notwithstanding the filing of a complaint. As stated, the legislation establishes a structure to conduct full and frank discussions between the parties to resolve the matters in dispute between them and conclude a collective agreement. The parties have recourse through the filing of an unfair labour practice complaint to enforce that statutory obligation. To allow a party against whom allegations of bad faith bargaining have been raised to cease negotiations pending the disposition of the complaint rewards that party for violating the Act or, at the very least, interrupts the process of negotiations. Once interrupted, it is more difficult to restart bargaining and time is lost. Indeed, requiring the parties to continue negotiations may well enhance the likelihood of

settlement of the original complaint. While it is theoretically conceivable that there might be circumstances where a refusal to continue negotiations might not violate the duty imposed by section 15, that is not the case here...

In the Board's view, if the union was under an obligation to continue to bargain pending the resolution of the section 15 complaint, the Board may legitimately consider those efforts in determining whether a violation is established and/or what, if any, relief would be appropriate in the circumstances. The Board has extensive experience in weighing the evidence and assessing the validity of the proffered explanations in light of the facts and motives which are reasonably probable in the circumstances. The labour relations community will more likely be well served through an assessment of all the circumstances in a particular case than if the Board's evaluation of the parties' conduct was artificially restricted to the application date, particularly in an area as fluid and dynamic as bargaining.

22. The Board is not suggesting that, in the instant case, the filing of the complaint was a tactical device. That event appears to have conveyed to the union the firmness of the company's position that the desk top memorandum constituted a modification of the bargaining unit definition. The union then tabled a modified proposal which removed the offending item. Thus, even if the first proposal contravened section 15, which for the reasons given the Board does not so find, the second proposal did not violate the duty to bargain in good faith. Given the historical pattern of negotiations, the Board is not prepared, at least in the instant case, to ignore the union's subsequent conduct in determining the appropriate disposition of the complaint.

23. The Board has traditionally been chary of examining the content of a party's collective bargaining proposals, except from the perspective of determining whether the party is merely "going through the motions" and has no intention of concluding a collective agreement: *Royal Conservatory of Music*, *supra* and the cases cited therein. The Board has examined the modified proposal in that vein and rejects the assertion that the proposal was "tailor made for rejection" as that term has been elaborated in the jurisprudence. The Board does not disagree with the sentiments expressed in *Graphic Centre (Ontario)*, *supra*, that the introduction of new items late in the bargaining process undermines that process. That decision goes on to state, in paragraph 21:

The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in good faith.

Here, the modified proposal is sustainable on an objective analysis. There were no wholesale changes to the initial document. The desk top memorandum was removed and that issue, essentially, made subject to the Board's processes under section 64/1(4) of the Act and to the grievance and arbitration procedure. The duration clause of the agreement was reduced from 2 1/2 years to 1 1/2 years, with corresponding elimination of references to wage increases, for example, which were scheduled, in the original proposal, to occur after the expiry date of the modified proposal. Given the lag time in negotiations mentioned earlier, the collective agreement in the second proposal would commence (retroactively) on January 1, 1992 and expire on June 30, 1993 rather than June 30, 1994.

24. Counsel for Commercial strenuously argued that the reduction in the term of the collective agreement constituted the gravamen of the offence, that Commercial would be forced back into negotiations well before its competitors and, inferentially, would be compelled to accept the original "illegal" (in counsel's view) first proposal. However, counsel's submissions gloss over the evidence as to the reasons for the alteration in the duration clause. The credibility of Mr. McDonnell's "will say" statements is not in dispute. The modified proposal was designed to ensure an opportunity to return to the bargaining table as soon as possible to deal with job security issues

flowing from the impact of desk top operations. Desk top systems carry the potential to virtually eradicate pre-press operations historically performed by the union's members. The union officials believe litigation before the Board and at arbitration could well consume several years. Moreover, given the pattern of negotiations in which the resolution of the contracts with the independent trade shops awaited the outcome of the bargaining between the union and the CPI, the union would not likely return to the bargaining table with Commercial until late 1994 or early 1995. Of significance, the desk top memorandum offered greater job security, through provisions dealing with the retraining of union members, to help offset the job losses expected even with the desk top memorandum. Given the rapid advancement of desk top technology, the union simply was not prepared to wait that long without the "standard" collective agreement accepted by the CPI and all but Commercial and one other independent. The Board regards that rationale as entirely defensible, tied to the legitimate self-interests of the union and, in the words of *Graphic Centre, supra*, "compelling evidence which would justify such a course" (i.e., the modified proposal).

25. Counsel for Commercial sought a direction from the Board that the desk top memorandum be removed from the original proposal and, in that event, indicated that there would be nothing left in dispute between the parties and a collective agreement would be concluded. There is no doubt such a result would be advantageous to Commercial. The company would have the benefits of pattern bargaining without the concomitant downside. In effect, by characterizing the desk top memorandum as the expansion of the bargaining unit, the company could "cherry pick" amongst the clauses in the pattern agreement to its benefit. Where parties have voluntarily organized their bargaining structures in rational ways, such as pattern bargaining in a particular industry, the Board will be reluctant to undermine such procedures by allowing one party, at the end of bargaining, to renounce the negotiating format and obtain a singular advantage for itself through invoking the Board's processes. The result in any particular case will reflect the individual circumstances, including the historical context, communications between the parties, etc. However, the Board will exercise its discretion to fashion appropriate remedies in ways which will enhance the process of collective bargaining rather than to provide any party with a "tactical windfall" which will ultimately undermine negotiations and the parties' collective bargaining relationship. In the instant case, the modified proposal may well be "worse" than the original, in the company's view. That does not necessarily imply the second proposal is a "penalty" and the Board does not so find.

26. In summary, the Board finds that the original proposal, including the desk top memorandum, did not constitute a contravention of the duty to bargain in good faith. In the alternative, even if the first proposal did violate the duty, the Board is not persuaded that, in the circumstances, any remedial directions or declarations are appropriate. Further, the Board concludes that the modified proposal, without the desk top memorandum, given the historical context and the union's rationale as expressed in the agreed statement of facts, does not contravene the duty to bargain in good faith nor comprise a penalty imposed on the company for filing the section 15 complaint with respect to the original proposal.

27. The foregoing are the reasons for the oral ruling given at the hearing and, for those reasons, the complaint is dismissed.

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**2212-92-OH Fred Nicholas, Applicant v. Fuji Hunt Photographic Chemicals Ltd., Fuji Photo Film Canada Inc. and Fuji Photo Film Co. Ltd., Responding Parties**

**Adjournment - Discharge - Environmental Protection Act - Evidence - Health and Safety - Practice and Procedure - Settlement - Employer seeking adjournment pending disposition of application in Ontario Court (General Division) for declaration that enforceable settlement entered into by the parties - Adjournment request denied - Board dismissing objection to anticipated evidence of complainant's former counsel - Evidence of communications between solicitors in furtherance of settlement not privileged where existence of agreement constituting issue in dispute - Board finding complaint settled in absence of signed documents confirming settlement and declining to inquire further into complaint**

**BEFORE:** *S. Liang*, Vice-Chair, and Board Members *W. H. Wightman* and *G. McMenemy*.

**APPEARANCES:** *Timothy Chudy* for the applicant; *John Martin*, *William Gale*, *David Harris* and *Nancy McCarthy* for the responding parties.

**DECISION OF THE BOARD;** June 4, 1993

1. This is a complaint made pursuant to the provisions of section 50 of the *Occupational Health and Safety Act*. The applicant also relies on the provisions of the *Environmental Protection Act*. The responding companies (who shall be referred to collectively as "Fuji") take the position that as this complaint has been settled between the parties, the Board ought to dismiss it.

2. At the outset of the hearing on May 13, 1993, the responding companies made a motion requesting that the Board adjourn the hearing of the issue of the settlement, pending the disposition of an application to the Ontario Court (General Division) dealing with the same matter. The Board declined to adjourn, and proceeded to hear evidence and representations as to whether the present complaint has been settled, reserving its ruling on the issue.

3. This complaint was commenced on October 28, 1992 and arises out of the termination of employment of Fred Nicholas on September 15, 1992 by Fuji. Upon receipt of the complaint, the parties were notified of a hearing to be held on December 10, 1992, as well as of the appointment of a Board Officer authorized by the Board to inquire into the complaint and to endeavour to effect a settlement. On consent of the parties, the hearing of December 10 was adjourned and the parties instead met with the Board Officer on that date. By the end of the day, the parties had filed with the Board a copy of a document titled "Minutes of Settlement" stating that they had agreed to adjourn the matter *sine die*. The responding companies allege that on December 10, the parties agreed to a complete settlement of the complaint.

4. By letter dated March 1, 1993, Fred Nicholas wrote to the Board stating:

Unfortunately a final agreement cannot be reached with the parties (RESPONDENTS) named above, therefore, please be advised that I would like to re-instate my Complaint filed under Section 50 of the O.H.S. Act.

In order to provide my Counsel with sufficient time to subpoena relevant witnesses, I would appreciate a date in late April or May 1993 for the Hearing to resume, provided this can be facilitated by the Board.

5. The parties were advised that the matter would be heard on April 8, 1993. Prior to this date, the parties agreed to request an adjournment of this date, and the hearing was re-scheduled

by the Board for May 12 and 13. May 13 was also subsequently adjourned by the Board on the request of the parties. On May 7, the Board received the following letter from counsel for Fuji:

We are the solicitors for the Respondents in the above-noted matter. The hearing of this complaint is scheduled to take place on May 12, 1993.

We wish to advise the Board that we will be requesting an adjournment of this matter, pending disposition of an application initiated by Fuji Hunt Photographic Chemicals Limited in the Ontario Court (General Division), scheduled to be heard on July 5, 1993. Our client is seeking a declaration of the court that an enforceable settlement agreement was entered into between Mr. Nicholas and Fuji Hunt Photographic Chemicals Limited, relating to all claims and potential claims Mr. Nicholas has against Fuji Hunt Photographic Chemicals Limited and the other corporations listed as Respondents in his complaint, with respect to his employment and the termination of his employment. We enclose herein a copy of the Notice of Application.

It is the position of our clients that the Ontario Court (General Division) is the most appropriate forum for making a final determination as to whether Mr. Nicholas and Fuji Hunt Photographic Chemicals Limited did in fact enter into a binding enforceable settlement agreement. It would appear that the Ontario Labour Relations Board in this case would have jurisdiction only to determine whether the parties had agreed to settle the complaint filed by Mr. Nicholas under section 50 of the *Occupational Health and Safety Act*. Since our clients wish to obtain a final determination by a court of competent jurisdiction relating to the settlement agreement in its totality, as opposed to an agreement to settle the complaint under section 50 of the *Ontario Health and Safety Act*, we will be requesting an adjournment of the hearing.

In the event that our request for an adjournment is denied by the Board, we will then proceed to make a preliminary motion that the parties reached an agreement to settle this complaint and, therefore, the hearing cannot proceed. In this regard, we will be calling three witnesses, namely Mr. William R. Gale of our office, Mr. David Harris (the former solicitor of Mr. Nicholas) and Ms Nancy McCarthy, an employee of Fuji Hunt Photographic Chemicals Limited. We will also be putting forth certain documentation which, in our submission, is evidence of the agreement. We are not providing the Board with this documentation at this time since we understand that counsel for Mr. Nicholas will be raising certain objections in relation to the admissibility of evidence that we intend to put before the Board relating to the settlement agreement itself.

### Adjournment

6. A copy of the application in the Ontario Court (General Division) was filed with the Board. The application was commenced on May 7. The relief sought is essentially that referred to in counsel's letter. According to the application, Fuji will rely at the hearing before the court on affidavits of William R. Gale, Nancy McCarthy and the evidence of David Harris to be obtained in aid of the application in accordance with Rule 39 of the Rules of the Court.

7. In the hearing before us, we were informed that the affidavits referred to have not yet been served. The evidence of Mr. Harris has not yet been obtained. Further, although the application refers to a settlement of "all claims and potential claims" in relation to Mr. Nicholas employment and termination of employment, no proceeding has been started by Mr. Nicholas other than the one before us.

8. As stated above, the Board ruled that it would not adjourn the hearing of this matter pending the court application. The applicant has requested that the matter be heard. The issue raised squarely by the responding parties is whether the Board should hear the complaint. Certainly, it appears to us that it is appropriate for, and perhaps incumbent upon, the Board in the circumstances to decide whether or not to allow the complaint to proceed. This is so whether or not the court may have a general declaratory power with respect to the rights between the parties, some of which pertain to the matters under this complaint.

9. Counsel for the responding parties acknowledged that the Board has the jurisdiction to determine whether the complaint before it has been settled. However, it was submitted that the primary issue between the parties is whether a more global agreement has been entered into, and on this, the Board's findings could not be binding on another court or tribunal. Thus, it is appropriate for the Ontario Court (General Division) to resolve the general issues, because its determinations would be final.

10. We agree that there may be issues raised by the application to the court which go beyond the issues raised by this complaint. On the other hand, we disagree that the primary issue between the parties is whether a more global settlement agreement has been entered into. It appears to us that at this time, the primary issue between the parties is the complaint. As stated above, at this time, it is the *only* proceeding between the parties. As the tribunal charged with jurisdiction to hear the complaint, it makes sense for the Board to determine whether this proceeding shall continue. The effect of our determination on other proceedings between the parties (which are at the moment hypothetical only) will be a matter for another tribunal or the courts.

11. We are also mindful of the fact that adjourning the issue will result in further delaying its determination. Although the application has been scheduled for hearing on July 5, there is no guarantee that it will proceed on that date. Having regard to the potential for cross-examinations on affidavits (which have not yet been served) and to the anticipated examination of Mr. Harris, there is a possibility that it will not be heard on the scheduled date. We view this as additional support for our decision not to adjourn the determination of an issue which the parties agree is within our jurisdiction.

### Settlement

12. On the issue of the settlement, the Board heard the evidence of David Harris (Mr. Nicholas' former counsel), William Gale (counsel for Fuji), Nancy McCarthy and Fred Nicholas. We have assessed the evidence and drawn inferences where necessary having regard to what is most probable in the circumstances. Much of the evidence is not in dispute. Where there is an irreconcilable conflict germane to our determinations, we have made decisions to prefer one version of events over another having regard to the relative credibility of the witnesses, their ability to resist the pull of self-interest in giving their testimony, and what is most probable in all of the circumstances.

13. At the outset of the hearing, counsel for Mr. Nicholas objected to the anticipated evidence of William Gale and David Harris, on the basis that evidence of communications between solicitors in furtherance of settlement is privileged. The Board ruled that the issue before us was the existence of an agreement. In such circumstances and having regard to the passages from Sopinka and Lederman, *The Law of Evidence in Canada*, to which we were referred, we were satisfied that the privilege did not apply.

14. On the evidence, the parties attended at the Board's offices on December 10 with the express purpose of trying to negotiate a settlement of the complaint. Discussions took place between about 10:20 a.m. and 12 p.m. In attendance were Nicholas, David Harris (counsel for Nicholas), Nancy McCarthy (Manager of Corporate Administration and Human Resources for Fuji Hunt Photographic Chemicals Ltd.), William Gale (counsel for Fuji) and Alex Vigar, the Board Officer. Over the course of the morning, Harris negotiated on behalf of Nicholas, who did not until the conclusion of the meetings meet directly with the other side. The responding parties and their counsel understood Harris to have full authority to act on behalf of his client, and nothing was said by any person to any other person to suggest otherwise.

15. At the conclusion of the discussions, the parties agreed to settle the complaint on the following terms:

- a. Fred Nicholas would be paid a monthly retainer equal to his gross salary at the time of the termination of employment for a period of twelve months beginning September 15, 1992, such payments to be made regardless of whether he became re-employed during this period;
- b. Fred Nicholas would be paid the same retainer for an additional six months after September 15, 1993, or until he became re-employed, whichever was earlier;
- c. If Fred Nicholas found re-employment after September 15, 1993 and before March 15, 1994, he would be paid 50% of the remaining balance;
- d. For the purposes of these payments, Fred Nicholas would be characterized as a consultant;
- e. The cessation of Mr. Nicholas' employment with Fuji Hunt Photographic Chemicals Ltd. would be characterized as a resignation and Fuji Hunt would provide a letter of reference to Mr. Nicholas;
- f. The normal releases would be provided (although, as we find below, there is some lack of clarity as to whether the parties intended for there to be *mutual* releases, we are satisfied that "normal releases" was intended to include at a minimum a release by Nicholas of all claims against Fuji);
- g. Fuji would pay \$2500 to Mr. Nicholas for legal fees.

16. Both Harris and Gale testified that agreement was reached on the above terms on December 10. McCarthy was present when counsel confirmed the agreement to settle, but not Nicholas. Harris met with Gale and McCarthy on Nicholas' behalf to confirm the agreement to settle. The parties agreed that Gale would draft a written agreement incorporating the terms of the settlement. Gale testified that after the agreement was concluded, the parties met together, at which time he and Nicholas shook hands and he congratulated Nicholas on the settlement, stating that it was a good settlement, that the morning had been worthwhile and that they had saved themselves perhaps twelve days of hearings.

17. Nicholas did not directly dispute the evidence of the above conversation. Neither does he dispute (except as outlined below) that an agreement to settle was reached on December 10 on the above terms. However, he states that he understood, and was told by Harris, that the agreement that was reached was a tentative agreement, "contingent on finalizing its particulars". (This was not put to Harris in cross-examination.) Nicholas also states that although Harris explained to him during the course of the discussions the general terms of the settlement, he did not explain all of its details. Harris was clear in his evidence that all of the proposed terms were explained to Nicholas by him, and that there was no question in his mind but that Nicholas understood the terms of the settlement.

18. As stated above, the general terms of the settlement set out above were not disputed by

Nicholas. However, Nicholas testified that right after the meeting, he discovered from talking to Harris that the amount of legal fees agreed to would not cover legal fees that he had incurred through another lawyer prior to his termination from employment. He did not raise it with Harris however. He states that he was “shocked”, “shook his head”, but remained silent about the matter.

19. Nicholas stated that as a result of his concern over the legal fees, he tried to contact Harris the following day by telephone. He testified that did not speak to Harris, but left a message with a receptionist or secretary, stating that the matter was urgent, he was leaving the country December 18, there was a problem with the agreement and he did not think he would be signing the agreement. There is no evidence as to whether Harris received this message. Nicholas testified that he left similar messages on December 14 and 17. Again, there is no evidence as to whether Harris received the messages, and he was not cross-examined on the point.

20. On December 15, both counsel sent letters to each other confirming the terms of the settlement reached on December 10. Since Gale had agreed to draft the documentation, he enclosed with his letter copies of a draft consulting agreement, release, and letter of resignation for Nicholas’ signature. The letter from Gale to Harris begins: “This will confirm the agreement which we reached December 11 [sic] to settle all of the issues flowing from the termination of Mr. Nicholas’ employment with Fuji Hunt Photographic Chemicals, Ltd...” The letter from Harris to Gale states: “I confirm we have agreed to resolve the complaint of Mr. Nicholas upon the following terms and conditions...” A copy of the letter from Harris to Gale was also sent to Nicholas. The terms of the settlement contained in these two letters are almost identical. There is some minor variation. For instance, the letter from Gale refers to the issuance of a new Record of Employment to Nicholas. The letter from Gale also states that Nicholas is to execute a comprehensive release in favour of the responding parties, while Harris states only that “[a]ppropriate releases shall be executed.”

21. Nicholas was out of the country from December 18 to about January 4. On January 4, he spoke on the phone with Harris, who told him that he had received the documentation from Gale. Nicholas raised his concern about the legal fees. Although, in Harris’ view, the further legal fees had clearly not been part of the settlement, Harris sent a letter to Gale requesting that Fuji consider paying for Nicholas’ legal fees prior to termination. On February 2, Gale informed Harris by letter that Fuji was not prepared to pay the further legal costs.

22. Some other correspondence was exchanged between counsel between December 15 and February 2, which is unnecessary for us to detail here.

23. Counsel for Nicholas submits that section 91(7) of the *Labour Relations Act*, which is incorporated into the *Occupational Health and Safety Act*, requires settlements to be in writing. Where, as in this case, there are no minutes of settlement, there is no settlement. Counsel does not dispute the law regarding a solicitors’ ostensible authority on behalf of a client, but submits that it ought not to prevail in the face of the clear statutory language. In effect, counsel is urging the Board to find that even if counsel for the parties understood there to be a binding settlement, the settlement ought not to have force unless the client has clearly agreed to it.

24. Counsel also submits that there was no agreement to settle on December 10 because some matters were not clearly settled. For instance, Harris testified that when he agreed to the provision of “normal releases”, he understood that there would be mutual releases exchanged between the parties. Gale testified that he understood this to mean that Nicholas would execute a release in favour of the responding parties.

25. Counsel for Fuji relies on a number of cases which set out that the relationship of a solicitor to his or her client is one of agent to principle. In his submission, any limitation of authority between a solicitor and client does not affect an opposite party unless that opposite party has notice of the limitation. Therefore, as in this case, a court or tribunal does not need to inquire into the authority of a solicitor to enter into a specific settlement. A settlement entered into by a solicitor about whom there is no dispute as to the existence of a retainer, will be enforced against the client. Counsel also referred the Board to cases before the courts which have applied this principle even in the face of statutory provisions (in family law legislation) requiring settlements to be in writing and signed by the parties. Counsel relied on: *Scherer v. Paletta*, [1966] 2 O.R. 524 (Ont. CA); *Picco v. Picco* (1987), 23 C.P.C. (2d) 149; *Geropoulos v. Geropoulos* (1981), 33 O.R. (2d) 829; *Geropoulos v. Geropoulos* (1982), 35 O.R. (2d) 763; *McKnight v. McKnight* (1981), 21 C.P.C. 174.

### Decision

26. Section 50(3) of the *Occupational Health and Safety Act* (“the OHSA”) states:

(3) The Ontario Labour Relations Board *may* inquire into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

[emphasis added]

27. Section 91(4) of the *Labour Relations Act* (“the LRA”) states in part:

91.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board *may* inquire into the complaint of a contravention of this Act ...

[emphasis added]

28. Section 91(7) of the *Labour Relations Act* provides:

91.-(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

29. Section 174(6) of the *Environmental Protection Act* (“the EPA”) states:

(6) Where the labour relations officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint.

30. The wording of section 50 of the OHSA, section 174(6) of the EPA, and section 91 of the LRA provide a discretion to the Board to decide whether or not to inquire into a complaint. In previous cases before the Board, the Board has refused to inquire, for example, where there has been undue delay in filing a complaint, or where the parties have settled a complaint. In *Graham Smith*, [1991] OLRB Rep. Oct. 1204, a complaint under section 85(2) [now 87(2)] of the Act, the Board concluded that the matter had been settled and exercised its discretion to decline to inquire further into the complaint. The Board's finding was made in the absence of any documents exe-

cuted by the parties confirming the settlement. On the subject of settlements in general, and settlements which are not in writing, the Board stated:

7. The Board has in its jurisprudence attempted to encourage settlement by ensuring that settlements will be reliable and final endings to the applications or complaints before it. In *Tony Hoosain*, [1987] OLRB Rep. Dec. 1513 the Board had this to say on the subject:

Each year, trade unions, employees, or employers file hundreds of applications or complaints before the Board. A great majority of them are settled. Sometimes the settlement favours a trade union or the employer. Sometimes it may favour an employee. Usually the settlement represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. Both the orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed minutes of settlement, a party could afterwards repudiate that settlement and revive the original proceedings because s/he later had second thoughts about the settlement terms.

8. In that case, the settlement was in writing. However, the Board has made it clear that even an oral settlement may result in it declining to inquire further into a complaint. For example, in *Madeleine Cloutier*, [1988] OLRB Rep. Apr. 375, the Board said as follows:

One of the distinguishing features of labour relations is that it operates in the context of continuing relationships. For that reason, among others, settlements are particularly desirable and the Board has accorded considerable priority to efforts towards this end. It is also essential that the Board's jurisprudence provide a legal climate which encourages and reinforces this goal. If parties to labour litigation cannot rely on their agreements, the Board's settlement processes may be rendered almost worthless. With respect to section 89 complaints, the Board has noted in the past that it has a discretion with respect to its inquiry. It has also declined to proceed further with a complaint in the exercise of that discretion where the parties have reached a settlement. (See, for example, *C. E. Jamieson & Co. (Dominion) Limited*, [1985] OLRB Rep. March 375).

9. The basis of the Board's discretion under section [91] is the permissive wording contained in section [91(4)] to the effect that "the Board *may* inquire into the complaint" (emphasis added). Section [87(2)] contains identical wording, and we conclude that we have a similar discretion with respect to complaints filed under that section. There is no question as well that the Board's policy considerations with respect to encouraging settlement and promoting orderly and final resolutions of cases are as compelling in these circumstances as in cases brought under section [91].

31. As well, in *H. John Barnes*, [1992] OLRB Rep. June 668 the Board found a settlement in a complaint under section 91 even in the absence of a formal settlement document. We do not read the provisions of section 91(7) to mean that agreements to settle a complaint which are not reduced to formal minutes will have no effect between the parties. In our view, the purpose of section 91(7) is primarily the provision of an enforcement mechanism for settlements. It does not qualify the Board's discretion under section 91 to decline to inquire into a complaint. Where there has been an agreement to settle the complaint, whether or not this agreement has been set down in writing, there are sound policy reasons to exercise our discretion not to inquire further.

32. On the evidence, we are satisfied that as of December 10, all parties and their counsel understood they had reached a settlement of the matter, containing the terms set out in paragraph 15 above. In the context of all the evidence we heard regarding the meeting of December 10, as well as the parties' subsequent actions, we find it extremely improbable that Harris would have told Nicholas that the settlement was "tentatively" only, "contingent on finalizing its particulars". When the parties left the meeting on December, they knew that Fuji was to pay certain monies to

Nicholas, as well as undertake certain other actions, and they knew that in exchange for this, Nicholas had agreed not to pursue any further action against Fuji.

33. We find that although counsel then intended to produce a written agreement setting out the terms of the settlement, this written agreement was meant to be confirmatory in nature. Having arrived at a settlement on December 10, it was not intended by either counsel that potential disputes over the details of the written documentation would have the effect of vitiating the settlement. Harris did testify in cross-examination that the draft consulting agreement would have to be reviewed with Nicholas in order for there to be “finality”, but he was clear that an agreement had been reached to set up a consulting arrangement for the purposes of payment. We find this consistent with the understanding of both counsel that there was a final agreement reached on December 10, but that the parties would then engage in the process of setting the agreement down on paper.

34. We find that Nicholas began to have second thoughts about the settlement. Initially, his second thoughts were centred on the issue of legal costs. We find that Nicholas’ legal costs from prior to the termination of employment were not part of the settlement reached on December 10. We find that the issue of legal costs was only a specific manifestation of Nicholas’ growing change of heart with respect to the settlement. He also states that on February 3, he received a copy of the draft documentation from Harris. He was taken aback at its length, considering the relatively short set of negotiations. He states that the issue of the release had never been discussed, and he was served with a long release. He was also taken aback by the terms of the draft consulting agreement which appeared to require that he make his services available to Fuji for the period of the payments. He was concerned that this might prevent him from seeking other work. Yet Nicholas made no attempt to clarify any of the above with Harris. Instead, he retained further counsel.

35. If Nicholas had been prepared on February 3 to adhere to the settlement reached on December 10, these concerns would not have been obstacles to him. For instance, it was clear to all parties on December 10 that the notion of a consulting agreement was a vehicle for the payment of the retainer to Nicholas. It was not the intent of Fuji to use Nicholas’ services during the period of payment. This could have been clarified and confirmed very easily.

36. Nicholas’ concerns about the length of the documentation and the length of the release reflect, in our view, growing unease about the settlement which had been concluded, rather than a conclusion that what Gale had drafted was not what had been agreed to. Among other things, we are satisfied that Nicholas *had* understood on December 10 that the settlement included the execution of a release by him concerning all claims against the respondents. We are satisfied that as of December 10, Nicholas knew that the terms of the settlement were as set out in paragraph 15 above (which were also confirmed in the letter from Harris to Gale which was copied to Nicholas).

37. Nicholas also made reference in his evidence to a concern that the settlement did not take into account his concerns over his potential liability as a former officer of the company for environmental matters. We are satisfied that this was not raised by him during the meeting of December 10, and was only raised by him subsequently as a further justification for attempting to abrogate the settlement.

38. We therefore find that as Nicholas began to have second thoughts about the settlement, he began to rely in his own mind on the fact that there were still settlement documents to be executed, as a means of at first trying to improve the settlement and then ultimately, as justification for walking away from the settlement. His perception that the settlement was not yet intended to be binding was not, however, grounded in any of the objective circumstances surrounding the settlement.

39. On the basis of our findings above, therefore, we would exercise our discretion not to inquire into this complaint. In any event, the law in Ontario regarding settlements entered into by solicitors appears to be well settled and was not disputed by counsel for Nicholas. In the oft-quoted decision in *Scherer v. Paletta*, *supra*, the Court of Appeal stated,

...

Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties. The scope of authority is, therefore, largely governed by the class of agent employed provided that he is acting within the limit of his ordinary avocation or by relation of the agent to the principal or by the customs of the particular trade or profession.

A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

40. It does not appear that the Board has dealt with the issue of a settlement where there has been a question raised with respect to counsel's lack of authority to enter into the settlement, but we have been given no compelling argument as to why the normal common law principles should not apply to proceedings before us. In our view, section 91(7) does not alter these common law principles, since as we have outlined above, section 91(7) does not preclude the Board from giving effect to oral settlements reached between parties. Further, by its very words, section 91(7) permits settlements in writing to be executed by parties' "representatives", which only places the issue squarely back within the general legal principles. We are satisfied that the principle in *Scherer v. Paletta*, *supra*, applies to the facts before us as both counsel were of the clear understanding that a settlement had been concluded. We thus give effect to the settlement reached insofar as we rely on it in the exercise of our discretion not to inquire into this complaint.

41. In the result, we decide not to inquire further into this complaint because it has been settled.

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**0136-93-R; 3507-92-G** Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Applicants v. **G.B. Metals Limited**, Aprich Enterprises Ltd., Arnold Glen Bursey, Responding Parties; International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Applicant v. **G.B. Metals Limited**, Responding Party

**Construction Industry - Practice and Procedure - Related Employer - Sale of a Business - Responding parties failing to reply to union's applications - Union asking Board to determine application without an oral hearing on the basis of material filed by the union and to deem facts pleaded in the application as having been accepted - Board granting union's request - Related employer declaration issuing**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

**DECISION OF THE BOARD;** June 9, 1993

## I

1. This is an application under sections 64 and 1(4) of the *Labour Relations Act*, filed together with a related application under section 126 of the Act. Sections 64, 1(4) and 1(5) read, in part, as follows:

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business; (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a

collective agreement or has requested the appointment of a conciliation officer or mediator, the successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

• • •

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

2. The purpose of these sections has been discussed in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 and *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945:

[Section 64]

18. ... When a business (or a part thereof) is transferred, or disposed of, the transferee acquires the business subject to the collective bargaining obligations of the transferor, the union retains bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement (if any) to the unit until the Board otherwise declares. Since the bargaining structure inherited from the predecessor may be inappropriate, or create conflicts with the successor's pre-existing bargaining obligations, the Board is empowered to define and, if necessary, restructure the unit to suit the new circumstances. Likewise, if the successor employer significantly alters the character of the business, or intermingles the employees of the purchased business with those in its existing operation, the Board may redefine the bargaining structure or determine whether the union's bargaining rights should be continued (section 55(4)-(6)) [now 64(4)-(6)]. However, until the Board otherwise declares, the transferee stands in the shoes of his predecessor with respect to established bargaining rights.

19. In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in "the employer" even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 [now 64] avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business". In *Marvel Jewellery*, [1975] OLRB Rep. Sept. 733 the Board described the effect of section 55 [now 64] as follows:

"Section 55 [now 64] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective

agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership”.

[Section 1(4)]

12. ... Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now 64] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 [now 64] has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase “whether or not simultaneously”. The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55 [now 64]. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union’s bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete disposition between the two firms so as to call section 55 [now 64] into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. ...

(See generally: Sack & Mitchell (*Ontario Labour Relations Board Practice* Butterworths, Toronto 1985 and updating supplement.)

3. In summary, sections 64 and 1(4) both involve the labour relations consequences of business transactions or corporate relationships; and both sections modify common-law notions of “privity of contract”, and the independent legal identity of a corporation. Put simply: collective bargaining rights and obligations attach to a business organization or undertaking and its real prin-

cipals, rather than the legal envelope through which business is carried out. Taken together, these sections continue bargaining rights when a business is transferred from one party to another, and prevent an owner from avoiding collective bargaining obligations by simply spinning off a new corporate vehicle.

## II

4. This particular application was filed on April 14, 1993, and alleges that G.B. Metals Limited has either transferred its business to the other responding parties or, in the alternative, that those parties are "related" within the meaning of section 1(4). In essence, the applicants contend that the business activities of G.B. Metals Limited are continuing under the umbrella, or through the auspices, of Aprich Enterprises Ltd. and Arnold Glen Bursey, one of the owners of G.B. Metals Limited. The applicant sets out the following material facts:

- i) The applicant Iron Workers District Council of Ontario (the "District Council") and the International Association of Bridge, Structural and Ornamental, Iron Workers, Local 721 ("Local 721") are parties to a collective agreement with the Ontario Erectors Association, Incorporated et al. covering the employment of iron workers in all sectors of the construction industry in the Province of Ontario (the "collective agreement"). The most recent collective agreement was entered into on August 24, 1992. Its term will expire on April 30, 1995 (Schedule "A").
- ii) The responding party G.B. Metals Limited ("G.B. Metals") is a corporation incorporated pursuant to the laws of Ontario carrying on business from 265 Belfast Court, Oshawa, Ontario (Schedule "B"). It is engaged in the installation of metal decking in the construction industry. The registered officers and directors of G.B. Metals are Arnold Glen Bursey ("Bursey") and his spouse Yvonne O'Neil. The directing mind and manager of G.B. Metals is Bursey. Its field operations are directed by Bursey.
- iii) The applicant obtained bargaining rights for employees of G.B. Metals by voluntary recognition agreement dated May 15, 1990 (Schedule "C").
- iv) Since or about May 1, 1992 G.B. Metals did not pay the proper rates to its employees and did not remit pension and benefit contributions or union dues on their behalf. The situation worsened to the point where by December 1992 most of G.B. Metals' employees were not paid at all for work performed. All this resulted in a grievance and decision of the Board dated February 19, 1993 (OLRB File No. 3001-92-G) (Schedule "D"). As of the filing of this application, G.B. Metals has not complied with the Board's order in that case.
- v) Subsequent to the Board's hearing into the said grievance, it came to the applicant's attention that G.B. Metals is operating under a new name, Aprich Enterprises Ltd. ("Aprich").
- vi) It is the applicant's understanding and belief that the directing mind of Aprich is Arnold Glen Bursey. He apparently has employed some of the same persons who formerly worked for G.B. Metals. It is engaged in the same type of work as G.B. Metals, that is, the installation of metal decking. A corporate search has revealed that Aprich was incorporated in Ontario on January 7, 1993 (Schedule "E"). The sole director and officer listed on the incorporation form is "April Bursey". We assume from the name that April Bursey is a relative of Arnold Bursey. April Bursey is not Arnold Bursey's wife. Those persons who have been employed by Aprich have informed the applicant that Arnold Glen Bursey was in fact their employer. Aprich's registered head office is the same as that of G.B. Metals. It is also the principal residence of Bursey.
- vii) It is the applicant's position that Aprich was established for the purpose of avoiding G.B. Metals' obligations under the collective agreement. Since there is no apparent reason for the incorporation of a new company performing the same type of work,

utilizing the same forces under the same direction, the applicant believes that Aprich was established in an attempt to avoid the obligations of G.B. Metals to pay its employees, former employees and possibly other creditors.

- viii) It is the applicant's further position that Arnold Glen Bursey is Aprich and G.B. Metals. There are no other management persons directly involved in either company. Bursey is engaged in a scheme to avoid his legal obligations through the legal vehicle of incorporation. There is strong indication from Bursey's past practices that he has every intention to create yet another corporate entity in an attempt to avoid the applicant and its collective agreement obligations. In these circumstances, it is the applicant's position that Glen Bursey is himself acting as a business or activity within the meaning of the *Act* in association with G.B. Metals and Aprich. All three entities are under his direction and control.
- ix) It is the applicant's position that there has been a sale of businesses between G.B. Metals, Aprich and Bursey.
- x) In the alternative, it is the applicant's position that the responding parties, at all material times, were carrying on associated or related business or activities under common direction and control within the meaning of section 1(4) of the *Act*.

5. The applicant also submits corporate reports in respect of the responding companies and a decision of the Board in File No. 3001-92-G. In that decision, the Board considered an application under section 126 of the *Labour Relations Act*, concluded that G.B. Metals Limited had failed to comply with a collective agreement by which it was bound, and directed the payment of damages. We might note that G.B. Metals Limited did not file a Reply in that proceeding nor appear at the hearing.

6. Notice of the present application under section 64 and 1(4) of the *Act* was given to each of the responding parties in Form B-23. That Notice advised the responding parties, *inter alia*, that the application had been made, and that if they wished to participate in the case they should file their response or intervention by April 28, 1993. The Notices to the responding parties all include this "IMPORTANT NOTE" in bold face capitals:

**THE BOARD'S RULES OF PROCEDURE DESCRIBE HOW A RESPONSE MUST BE FILED WITH THE BOARD WHAT INFORMATION MUST BE PROVIDED AND THE TIME LIMITS THAT APPLY.**

**IF YOU DO NOT FILE YOUR RESPONSE AND OTHER DOCUMENTS IN THE WAY REQUIRED BY THE RULES, THE BOARD MAY NOT PROCESS YOUR APPLICATION AND DOCUMENTS, YOU MAY BE DEEMED TO HAVE ACCEPTED ALL OF THE FACTS STATED IN THE APPLICATION, AND THE BOARD MAY DECIDE THE CASE ON THE MATERIAL BEFORE IT WITHOUT ANY FURTHER NOTICE TO YOU.**

**PLEASE CONSULT THE BOARD'S RULES OF PROCEDURE BEFORE COMPLETING THIS RESPONSE. COPIES OF THE BOARD'S RULES MAY BE OBTAINED FROM THE BOARD'S OFFICE LOCATED ON THE 4TH FLOOR, 400 UNIVERSITY AVENUE, TORONTO, ONTARIO (TEL. (416) 326-7500).**

**YOU HAVE THE RIGHT TO COMMUNICATE WITH, AND RECEIVE AVAILABLE SERVICES FROM, THE BOARD IN EITHER ENGLISH OR FRENCH.**

**PLEASE INDICATE WHETHER YOU WILL REQUIRE ANY SPECIFIC SERVICES, INCLUDING TRANSLATION SERVICES FOR WITNESSES, OR SERVICES FOR PERSONS WHO ARE HEARING OR VISION IMPAIRED, OR OTHER SERVICES. THE BOARD WILL ATTEMPT TO ACCOMMODATE YOU, BUT MAY NOT BE ABLE TO MEET YOUR SPECIFIC REQUEST(S).**

The Notice makes it clear that if a party does not reply, it “may be deemed to have accepted all of the facts stated in the application ...”. That warning is in accordance with Rules 19 and 20 which provide:

19. If a party receiving notice of an application does not file a response in the way required by these Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the Board may decide the case upon the material before it without further notice.
20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

7. As of the day hereof (i.e. about five weeks after the terminal date for filing a Reply), there has been no Reply from any of the responding parties, nor any other indication that any of them wish to participate in or contest this application or any of the facts set out in it.

8. On May 4, 1993 the applicants requested that the Board deal with the matter on the basis of the material before it, without a formal hearing. Counsel submits that the responding parties have failed to file any response and that the uncontradicted facts pleaded in the application must be deemed to be accepted and make out a *prima facie* case for the relief requested (see: *Lakeridge Acoustics*, [1993] OLRB Rep. Feb. 137). In the applicants’ submission, no formal hearing is necessary. The Board need only apply its own Rules which have been specifically brought to the responding parties’ attention.

### III

9. The Board sees no reason why it should not grant the applicants’ request. The responding parties have chosen not to reply to the application or otherwise indicate any interest in participating in the proceeding. Despite the Rules and the specific warning on Notice Form B-23, the responding parties have not contested the facts upon which the applicants rely, nor opposed the relief to which the applicants claim they are entitled. In the circumstances, the Board sees no reason why it should magnify the costs to the parties and the public by scheduling a formal hearing to adjudicate matters which have not been put in issue - not least because it is not at all clear what facts (if any) the responding parties would be permitted to raise so belatedly and there was no response to 3001-92-G either.

10. The Board finds that the facts stated by the applicants make out a case for the relief requested and that those facts are uncontradicted and are deemed to be accepted by the responding parties. We reiterate: the responding parties have filed no response nor raised any reason why the Board should not draw the inferences and make the findings which flow from those facts, namely that:

- (a) the responding parties are engaged in related activities or businesses under common control or direction; and/or
- (b) a business or a part of the “business” of G.B. Metals Limited has been transferred to the other responding parties.

11. The Board declares that the responding parties are one employer for the purposes of the Act.

12. In view of the declaration in the preceding paragraph, it is unnecessary to decide whether the circumstances also warrant a declaration of successorship under section 64 of the Act.

13. It follows that the responding parties continue to be bound by the collective bargaining obligations and collective agreements of G.B. Metals Limited, including any liability payable under that collective agreement.

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**0185-93-R International Brotherhood of Electrical Workers, Local 353, Applicant v. General Signal Limited, Responding Party v. Group of Employees, Objectors**

**Certification - Practice and Procedure - Union seeking leave to withdraw certification application following emergence of dispute concerning composition of bargaining unit - Board dismissing application - Union filing subsequent certification application - Employer asking Board to exercise its discretion under section 105(1)(i) to not consider subsequent application or, in the alternative, to direct a representation vote - Board declining employer requests - Board granting interim certification**

**BEFORE:** *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Rundle* and *K. Davies*.

**APPEARANCES:** *Bernard Fishbein*, *Graeme Aitken* and *Larry Venning* for the applicant; *David L. Brisbin*, *Neill Jeffrey*, *Geoffrey Bourne* and *David Pinto* for the respondent; *Ken Roach*, *Don Hickey*, *Gary Jones* and *Steve R. Gerber* for the objectors.

**DECISION OF THE BOARD;** June 8, 1993

1. This is an application for certification filed with the Board on April 19, 1993. A hearing was held to determine a number of outstanding issues on May 17, 1993.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. The applicant on March 12, 1993 had filed an earlier application for certification for a bargaining unit that although differently described, affected substantially the same employees as the present application (OLRB File No. 3730-92-R). In the course of proceedings in that application, the parties met with a Labour Relations Officer and reached agreement on numerous matters. However, it appears that there was no agreement as to the inclusion of three employees performing certain technical functions in the otherwise agreed upon unit. Although the applicant challenged the inclusion of these employees on "community of interest" grounds, a determination by the Board that they are included in the unit for purposes of the "count" would have placed the union in a position where it could not demonstrate sufficient membership support for certification without a vote pursuant to section 9.1(2) of the Act.

4. According to counsel for the trade union, faced with the prospect of potentially protracted proceedings during which the inclusion of the three employees would be determined, the trade union chose instead to obtain additional membership evidence, and to file a second application for certification. Thus, by letter dated April 19, 1993, counsel for the applicant trade union requested leave of the Board to withdraw the first application for certification and, on the same

day, filed with the Board the present application. However, on April 20, 1993, a differently constituted panel of the Board refused leave to withdraw the first application and instead determined that the application should be dismissed.

5. Finally, it should be noted that although no “statements of desire” indicating a retraction of trade union membership were received by the Board in the interim period between the filing of two applications, some evidence of that nature was sought to be filed subsequent to the second application date. At the hearing, it was agreed by all parties that such evidence could not be considered by the Board in the context of either application in light of the operation of section 8(4) of the Act. Section 8(4) of the Act reads as follows:

8.- (4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

6. The responding party employer takes objection to the trade union’s manner of proceeding, which counsel characterized as a manipulation of the Board’s processes. It urged the Board to exercise its discretion pursuant to section 105(1)(i) of the Act and to not consider the present application on the basis that the trade union was, in effect, attempting to avoid the taking of a representation vote. In support of its position in this respect, employer counsel argued that the principles outlined in *Mathias Ouellette*, 1955 CLLC ¶18,026 have application to the present circumstances and that the Board should, in effect, impose a bar to the subsequent application. In that decision, the Board stated at page 1556:

It seems to us that a trade union should not be permitted to anticipate defeat in a representation vote and escape the consequences of defeat by seeking to withdraw its application after such a vote has been directed by the Board but before the vote is taken.

7. In the the alternative, counsel for the employer argued that in light of the circumstances outlined above, the Board ought to exercise its discretion pursuant to section 8(3) of the Act and to direct that a representation vote be taken. Counsel for the employer argued that the combined effect of the union’s filing of a second application and the provisions of subsection 8(4) of the Act created an unfairness to which the Board should respond by refusing to certify without a representation vote. By withdrawing and then refileing its application with the knowledge that the application date was also the terminal date for the receipt of membership evidence, it was contended, the trade union was unfairly creating for itself a later terminal date and yet denying it to potentially objecting employees. Counsel urged us to exercise our discretion in a manner similar to that in *Children’s Air Society of Owen Sound and The County of Grey*, [1984] OLRB Rep. July 995.

8. At the conclusion of the parties’ argument, the Board rendered the following oral decision:

It is the Board's unanimous decision that these are not appropriate circumstances in which to impose a bar to the certification application. The Board is mindful that the imposition of a bar constitutes a significant curtailment of employees' statutory rights to organization in a trade union. Accordingly, the practice of the Board has been to limit the imposition of a bar to circumstances in which a request for withdrawal is made at a stage of proceeding where the applicant must be anticipating defeat upon direction of a representation vote, or when there are some "special and extreme circumstances" present [see *Belair Restoration (Ontario) Inc.*, [1992] OLRB Rep. Jan. 13 paragraphs 5 and 6]. The Board is satisfied that no such circumstances are present, and indeed, none are alleged. Accordingly, we are not of the view that the principles in *Mathias Ouellette* 1956 CLLC ¶18,028 have application to the present matter. Consequently, we decline to impose a bar and to not consider the present application.

Secondly, the Board is also unanimously of the view that there exists no basis upon which to exercise our discretion to order a vote in the present circumstances. The practice of filing an application is in itself by no means inappropriate, improper or otherwise colourable. Moreover, although the objecting employees' ability to voice their objection to the union in these proceedings would be limited, we are of the view that this effect results from the intended operation of section 8(4) of the Act, not from the action of the trade union. Accordingly, we do not find that rights have been affected in a prejudicial manner so as to require the Board to exercise its discretion and to order a vote. (Board Member Rundle will provide a concurring opinion).

9. In addition, an issue arose as to the inclusion of "summer students" in the bargaining unit description. The point was fully argued, and at the hearing the Board advised the parties that it would reserve and provide its decision in writing at a later date.

10. The parties have otherwise reached agreement on all matters in dispute between them. The Board has determined that the applicant's right to certification cannot be affected by the inclusion of "summer students" in the bargaining unit description. Upon a joint request of both parties, the Board advised the parties that an interim certificate would issue.

11. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit, at the time the application was made, were members of the applicant on April 19, 1993, the certification application date, or had applied to become members of the applicant on or before that date.

12. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, having regard to the agreement of the parties and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for:

all employees of General Signal Limited working at or out of the City of Mississauga, in its service division of its Edwards unit, save and except supervisors, persons above the rank of supervisor, office and sales staff, and pending the resolution of the status of these categories, excluding as well students employed during the school vacation period.

*Clarity Note:* For the purpose of clarity, the parties agree that the bargaining unit does not include employees performing work for the International Division, which is not work for the Ontario market.

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**3552-92-R International Union of Operating Engineers, Local 793, Applicant v. Grant Paving & Materials Limited, Responding Party v. Group of Employees, Objectors**

**Bargaining Unit - Certification - Union and employer agreeing in waiver process to bargaining unit description excluding part-time employees - Subsequently, union requesting amendment of bargaining unit to include part-time employees in accordance with section 6(2.1) of the Act - Board not permitting union to resile from its agreement in waiver process and rejecting submission that bargaining unit amendment "required" by the Act**

**BEFORE:** *Louisa M. Davie*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

**DECISION OF THE BOARD; June 10, 1993**

1. This is an application for certification in which the parties through a Labour Relations Officer apparently reached agreement on certain matters in dispute between them and agreed to waive the hearing which had been scheduled before the Board. Subsequent to that apparent agreement counsel for the trade union wrote to the Board and requested an amendment to the bargaining unit which the union seeks to represent in this application. It is that request for an amendment with which this decision will deal.

2. The application was filed on March 4th, 1993. At that time the applicant trade union sought to represent a bargaining unit described in the following terms:

all employees of the Responding Party in the Town of New Liskeard, save and except foreperson, persons above the rank of foreperson, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

3. In its response filed on March 19th, 1993 the employer indicated that it did not employ any persons at premises located in the Town of New Liskeard. The employer noted that it did operate premises "located at the south part of Lot 8 at Concession 3 in the Township of Dymond. Approximately 33 employees are employed at this location". In its response therefore the employer requested that the application be dismissed as there were no employees in the bargaining unit.

4. By letter dated March 25th, 1993 the trade union confirmed that the employer's premises were as stated in the response. As a result it requested an amendment to its bargaining unit description. Counsel for the trade union wrote:

Accordingly, the bargaining unit description reads:

all employees of the Responding Party in the Township of Dymond, District of Temiskaming, save and except foreperson, persons above the rank of forepersons, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

5. By letter dated March 30th, 1993 counsel for the employer advised the Board that "the parties are in agreement that the bargaining unit described in [the] letter ... dated March 25, 1993 is appropriate."

6. On March 30th, 1993 the parties also completed the Board's usual "waiver process". With the assistance of the Board officer the parties agreed on a number of matters including the description of the bargaining unit, the waiver of the hearing before the Board, and the appoint-

ment of an officer to inquire into and report to the Board on those issues which remained in dispute between them.

7. The bargaining unit agreed upon as noted in the Board officer's letter dated April 6th, 1993 which confirmed the results of the waiver process was:

all employees of Grant Paving & Materials Limited in the Township of Dymond, District of Temiskaming, save and except forepersons, persons above the rank of foreperson, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

8. By letter dated March 31st, 1993 counsel for the union wrote as follows:

Pursuant to section 6(2.1) of the *Labour Relations Act*, R.S.O. 1990 c. L.2. as amended, we request an amendment of our Application to delete the part-time and student exemption from the bargaining unit. Accordingly, the bargaining unit description now reads:

all employees of the Responding Party in the Township of Dymond, District of Temiskaming, save and except foreperson and persons above the rank of foreperson.

9. After receipt of the Board officer's letter of April 6th, 1993 and the union's letter of March 31st, 1993 requesting the amendment to the bargaining unit, the employer wrote to the Board on April 7th as follows:

Grant Paving submits that the Applicant ought not to be permitted to amend the bargaining unit that was agreed to between the parties. This bargaining unit is set forth in Appendix "A" to Mr. Bowman's letter.

It would appear from Mr. Bowman's letter, that the Board has denied the Applicant's request. Accordingly, we will not make detailed submissions in this regard. Grant Paving would *not* have agreed to the bargaining unit described in [letter dated March 31st, 1993]. Further, I advised counsel for the Applicant regarding the approximate number of workers that would be on the Schedules filed by Grant Paving ..., prior to the Applicant's request ... to further amend the bargaining unit.

10. In response, on April 8th, 1993 counsel for the trade union wrote as follows:

The bargaining unit which the Applicant requested in its letter dated March 31st, 1993 is that deemed appropriate pursuant to Section 6(2.1) of the *Labour Relations Act*. Separate bargaining units for full-time and part-time employees are only appropriate in the circumstances described in subsections (2.2)-(2.5) of Section 6 of the Act. In order for the Board to determine whether separate full-time and part-time units are appropriate, it must establish the level of membership support for the Applicant in the single unit of both full-time and part-time employees. In order to do so, the Board must have Schedule "B" from the Responding Party. Therefore, we request the Board order the Responding Party to file a Schedule "B" and then deal with the application for certification in accordance with the provisions of subsections (2.1)-(2.5) of Section 6 of the Act.

11. In a letter dated April 19th, 1993 counsel for the employer again indicated his opposition to any amendment. It was his position that the parties had agreed to a bargaining unit and the trade union ought not to be able to resile from that agreement. He asserted that this matter should now proceed in the fashion agreed upon during the waiver process.

12. Thereafter, by correspondence from the Board on April 29th, 1993 the parties were advised to make written submissions to the Board on this matter.

13. The written submissions of the parties which were subsequently filed with the Board did

not significantly alter or add to their positions as expressed in this earlier correspondence. The employer continued to take the position that in the circumstances the trade union ought not to be permitted to amend a bargaining unit agreed upon and thereby resile from an agreement reached during the Board's waiver process. Counsel for the employer relied upon *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305 and the statements therein which refer to the fact that "the Board's policies and procedures are structured in a manner designed to limit the ability of any party to gerrymander the list of employees or the structure of the bargaining unit". The employer noted that the trade union's request came after the employer had submitted the employee lists without the names of part-time employees. The employer reiterated its position that it would not have agreed upon the "all employee" unit now sought and might propose a different bargaining unit if the trade union were allowed to further amend its position.

14. For its part the trade union reiterated its position that the bargaining unit description "must conform to section 6(2.1)" of the Act and that this is "required" by the Act. The trade union asserted that there was "no issue of resiling from an agreed bargaining unit description in the circumstances" and that *Runnymede Development Corporation Limited* did not apply because there had not been a disclosure of the list of employees nor had there been any challenges to that list prior to the amendment request. Accordingly, the request to amend the bargaining unit was not made as a result of information received from either counsel for the employer or the Labour Relations Officer. Having not received any list of employees, and in particular no Schedule "B", the trade union indicated that it was unaware as to what effect, if any, its proposed amendment would have.

15. In response counsel for the employer disputed the trade union's assertion of facts and indicated that the employer had discussed the "approximate number of workers on the employee schedules before the applicant sought to amend the unit".

16. In the circumstances of this case the dispute between counsel as to whether information had or had not been disclosed is not relevant to resolving the primary conflict in their respective positions. In our view that conflict may be summarized by asking whether the statute compels the Board to determine a bargaining unit consisting of both full-time and part-time employees to be appropriate notwithstanding the parties' agreement upon a bargaining unit consisting of full-time employees only.

17. We have phrased the issue in this case in this manner for two reasons. First, the applicant has not disputed that on March 30th, 1993 during the Board's usual waiver process the parties reached agreement on the bargaining unit description. Secondly, in the face of that agreement, and in the circumstances of this case, the Board would not generally permit either party to resile from an agreed upon bargaining unit description. To put it another way, the agreed upon bargaining unit description would not on its face cause the Board any concerns *but for* the argument implicit in counsel for the trade union's submission that as a result of the newly enacted statutory provisions the Board is without jurisdiction to find as appropriate a separate full-time employees only bargaining unit in these circumstances. For many years the Board has consistently accepted the agreement of the parties with respect to the description of the bargaining unit. The circumstances in which the Board does not accept a bargaining unit description agreed upon by the parties are generally extraordinary and unusual.

18. In the present circumstances, we would not have entertained the applicant's request to amend the agreed upon bargaining unit description *but for* the argument of counsel for the trade union which suggests that by reason of the statutory amendments the Board can no longer accept such agreements (at least where the agreement relates to a separation of full-time and part-time

bargaining units). The principles enunciated by the Board in *Runnymede* with respect to the attempts by a party to resile from agreements reached on the list of employees in the bargaining unit apply equally to the situation before us. This is particularly true when it is remembered that the agreement in this instance was reached during the Board's usual "waiver" process. That process has been developed and encouraged by the Board (in response to the concerns of the labour relations community) to expedite certification applications, reduce litigation, encourage settlement and generally make more efficient use of the time and resources of both the Board and the parties appearing before it. The integrity of that waiver process may be undermined if the Board were to permit parties to resile from agreements reached during that process in the absence of any compelling reasons to do so.

19. In this instance (and leaving aside for a moment the issue as to whether the bargaining unit applied for *must* conform with section 6(2.1)) the applicant has not provided any reasons why it should be permitted to "change its mind" about the description of the full-time only bargaining unit for which it first sought certification (on March 4, 1993) which it subsequently affirmed when it sought the first amendment relating to the geographic scope of the unit (on March 25th, 1993), and which it further affirmed during the waiver process with the Labour Relations Officer (on March 30th, 1993).

20. We turn then to the applicant's assertion that the amendment requested should be granted because the bargaining unit *must* conform to the new statutory provisions found in section 6(2.1) of the Act. In our view the language of the statute does not clearly compel such a result. The applicant in its written submissions has not provided any legal authority, analysis or submissions which support the assertion that the bargaining unit amendment requested is "required" by the Act. In our view if the Legislature had intended the result suggested by the trade union it could have simply said so in clear, simple and precise language.

21. We have determined that as presently framed the language of the statute viewed in its entirety should be viewed in a permissive and not exclusive fashion. Thus, where an applicant trade union applies for a bargaining unit which includes both full-time and part-time employees it will be *deemed* to be appropriate by the Board pursuant to section 6(2.1) of the Act. However, where the applicant has *not* applied for such a unit (and the respondent has also not requested such a unit) the statutory language does not compel the Board to nevertheless initially determine a full-time and part-time employee bargaining unit to be appropriate with the consequent result that a separate full-time bargaining unit will only be certified where the requisite level of support is not found in such an all inclusive unit. The statutory language does not unequivocally point to such a conclusion. Aside from the assertion that the language compels such a course of conduct by the Board the applicant has not articulated any labour relations reasons nor has it provided an analysis or interpretation of the statutory language to support that result.

22. Moreover, it may be that sound labour relations between the parties supports a less interventionist approach by the Board. Such an approach would certainly be more consistent with the Board's general approach that it will not interfere with a description of the bargaining unit agreed upon by the parties unless there are extraordinary or compelling reasons to do so. Nothing in the material before us and none of the submissions of the parties suggest that such reasons are present in this case.

23. For all of these reasons we have determined to dismiss the applicant's request to amend the description of the bargaining unit it had previously agreed upon. A Labour Relations Officer is hereby appointed to inquire into and report to the Board on the issues which remain in dispute between the parties.

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**2714-92-G; 2715-92-R** Labourers' International Union of North America, Local 837, Applicant v. **Kepic Wrecking Inc.** and 963590 Ontario Inc. c.o.b. as Kepic Wrecking, Responding Parties

**Construction Industry - Related Employer - Sale of a Business - Responding employers operating demolition businesses owned by father and son - Board finding no sale of equipment or other commercial transactions between responding employers, but determining that goodwill in effect transferred from father's business to son's business - Board finding sale of a business - Employers also engaged in same business under joint direction or control - Related employer declaration issuing**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *D. A. Patterson*.

**APPEARANCES:** *John Moszynski*, *Caroline Hart*, and *Manuel Baston* for the applicant; *Ronald Kepic* for 963590 Ontario Inc.; no one appeared on behalf of Kepic Wrecking Inc.

**DECISION OF THE BOARD;** June 7, 1993

1. Board File No. 2714-92-G is a referral to the Board of a grievance in the construction industry pursuant to section 126 of the *Labour Relations Act*. Board File No. 2715-92-R is an application, under sections 1(4) and 64 of the Act, in which the applicant (the "Labourers") asserts that there has been a sale of business from Kepic Wrecking Inc. to 963590 Ontario Inc. c.o.b. as Kepic Wrecking, or that those two entities constitute one employer for purposes of the *Labour Relations Act*.
2. The applications were heard together on April 22, 1993. No one appeared at the hearing on behalf of Kepic Wrecking Inc.
3. On the evidence, Kepic Wrecking Inc. is bound by the collective agreement between the Metropolitan Toronto Demolition Contractors Inc., and the Labourers International Union of North America, and the Labourers International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 (see also, *Kepic Wrecking Inc.*, Board File No. 0088-92-G, July 7, 1992, unreported).
4. Although Kepic Wrecking Inc. filed nothing with the Board and did not appear at the hearing, and could therefore be taken as having admitted what is alleged by the Labourers herein (see *Lakeridge Acoustics*, [1993] OLRB Rep. Feb. 137), 963590 Ontario Inc. c.o.b. as Kepic Wrecking did appear and contested the applications. Default by one responding party does not necessarily bind another and we do not find it appropriate to dispose of these matters without considering the evidence presented.
5. Ronald Kepic is the principal and sole proprietor of 963590 Ontario Inc. c.o.b. as Kepic Wrecking. His father, Steve Kepic, is the principal and sole proprietor of Kepic Wrecking Inc. For many years prior to January, 1992, Ronald Kepic worked on and off for Kepic Wrecking Inc., and for various other demolition contractors, some of which appear to be owned and operated by other relatives. On or about January 22, 1992, Ronald Kepic incorporated 963590 Ontario Inc. He registered "Kepic Wrecking" as the name 963590 Ontario Inc. was to operate under on or about March 16, 1992. Ronald Kepic testified that he decided to start his own company because his father is considering retirement and "I need an income." He chose Kepic Wrecking as an operating name in

order to take advantage of the goodwill associated with that name in the wrecking industry, particularly in the Hamilton area. He testified that he chose this name despite his father telling him not to (although it is evident that Steve Kopic did not feel sufficiently strongly about this to try to prevent Ronald Kopic from using Kopic Wrecking as a business name). Ronald Kopic testified that he had planned to buy certain equipment from Kopic Wrecking Inc. for use by 963590 Ontario Inc. c.o.b. as Kopic Wrecking but decided not to, largely because he thought that "it would help the union's case." Indeed, he conceded that he would have purchased the equipment but for that concern. Ronald Kopic made it quite clear that he wanted nothing to do with the Labourers.

6. When employed by Kopic Wrecking Inc., Ronald Kopic often acted as a working foreman with managerial responsibilities. Although he performed manual labour and operated machines, he also has had overall responsibility for job sites when his father was not there. He has supervised employees of both Kopic Wrecking Inc. and any of its sub-contractors on job sites. He has had authority to hire new employees and has made lay-off recommendations, some of which were followed and some not, to his father. On occasion (on a Sarnia job done under an Electrical Power Systems Construction Association agreement in 1993 for example) Ronald Kopic was engaged by Kopic Wrecking Inc. in a purely managerial capacity. On occasion, Ronald Kopic helped Steve Kopic prepare bids Kopic Wrecking Inc. submitted for jobs. Ronald Kopic also has a Kopic Wrecking Inc. business card with his name and home telephone number on it.

7. The subject of the grievance herein is what was referred to by the parties as a "Dare Foods" job which involved the demolition and removal of a four-storey L-shaped building on Jackson Street in Hamilton. This demolition work was actually performed for Hamilton Car Parks Ltd. which had acquired a lease for the property which included the right to demolish the building and construct a parking lot.

8. Hamilton Car Parks Ltd. gave the contract for the demolition work to Kopic Wrecking Inc. There is a long history of Kopic Wrecking Inc. performing demolition work for Hamilton Car Parks Ltd. This helps to explain why the demolition arrangement, pursuant to which Kopic Wrecking Inc. received \$50,000 plus salvage rights, was made on a handshake between Richard Leibtag, General Manager of Hamilton Car Parks Ltd. and Steve Kopic.

9. The demolition work on the Dare Foods job began on or about October 15, 1992. Although the estimates varied, it seems that there were six to eight persons engaged in demolition work at the site between mid-October, 1992 and the end of December, 1992. During that period, Ronald Kopic was on the site as a representative of Kopic Wrecking Inc. It seems that the remainder of the persons on the site were employees of either Gerry's Wrecking (?) to which Kopic Wrecking Inc. had "sold" or sub-contracted the demolition work and salvage rights with respect to lumber, or Smith's Reclaimed Bricks, to which Kopic Wrecking Inc. had "sold" or sub-contracted the demolition work and salvage rights with respect to bricks. After January 1, 1993, the work proceeded less quickly and Ronald Kopic was only occasionally on the job site. The work was virtually completed by early April, 1993.

10. The Labourers claimed that there were 130 eight-hour days of work for eight workers on this job (i.e. 1040 eight-hour worker days). On the basis of the evidence before the Board, we find that there were an average of seven men on the job between October 15 and December 31, 1992. Not counting statutory holidays, this amounts to 371 eight-hour worker days (53 days x 7 men). Between January 1, 1993 and April 9, 1993, which we find is the date the job was completed, we find, on the basis of the evidence, that there were an average of five men on the job. This amounts to 345 eight-hour worker days. (69 days x 5 workers). The total then is 716 eight-hour worker days.

11. It is clear that the demolition work on the “Dare Foods” job was covered by the collective agreement referred to in paragraph 3, above. It is also clear that the Labourers had many unemployed members who were ready, willing and able to perform the work. Keping Wrecking Inc. employed no members of the Labourers to perform any of the work it did on the job site. Further, neither of the companies to which it sold or sub-contracted work on the site was bound to a collective agreement with the Labourers. Nor did they use members of the Labourers to do the work. Keping Wrecking Inc. clearly breached its obligations under the collective agreement as aforesaid; namely, to employ members of the Labourers to do the work, or to sub-contract the work to contractors with respect to which the Labourers or another affiliate of the Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial District Council had collective bargaining rights.

12. The further question is whether 963590 Ontario Inc. c.o.b. as Keping Wrecking bears any responsibility in that respect because it and Keping Wrecking Inc. constitute one employer for purposes of the *Labour Relations Act*, or because there has been a sale of business between Keping Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Keping Wrecking.

13. Section 1(4) of the *Labour Relations Act* provides that:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Section 64 of the Act is commonly known as a “successor employer” or “sale of business” provision. In *Pinecrest-Queensway Health and Community Services*, [1992] OLRB Rep. Nov. 1211, the Board described, at paragraphs 6-9, the purpose and effect of sections 1(4) and 64 of the Act as follows:

6. Section 1(4) applies to situations in which activities which generate employment relations governed by the *Labour Relations Act* are carried on through more than one legal entity, whether or not at the same time. This provision gives the Board the power to pierce the corporate veil and declare two or more entities to constitute one employer for purposes of the Act where the Board is satisfied that they are engaged in associated or related activities under common direction or control. In that respect, section 1(4) modifies traditional common-law notions which are based upon the separation between legal entities and the privity of contract. It is a remedial provision intended to prevent the intentional or incidental frustration or erosion of established bargaining rights consequent upon changes in the structure or form of what is, for labour relations purposes, a single business or activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, the Board is entitled to treat them as being one employer for labour relations purposes if they carry on associated or related activities under common control or direction. The purpose of section 1(4) is to protect the bargaining rights of a trade union and the rights of employees to bargain collectively with their employer through that trade union from being undermined by the form, or an alteration of the form, of a business or activity. In applications under section 1(4), the Board is concerned with the functional relationship between entities. Businesses or activities are “related” or “associated” because they are of the same character, serve the same general market, employ the same mode or the means of production, utilize similar employee skills, or are carried on for the benefit of related principals (see, for example, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353). Where the Board is satisfied that two or more entities carry on associated or related activities or businesses under common control or direction, which may but does not necessarily include control over employees, the Board may declare that those entities constitute one employer for purposes of the *Labour Relations Act*. The effect of such a declaration is

that the affected entities share the rights and obligations of an employer under the Act and any applicable collective agreement.

7. Section 64 has the same purpose and a similar effect. Like section 1(4), it recognizes that a “business” is a concept which does not lend itself to precise definition. Rather, a business is an economic activity (whether for profit or not) which can be conducted through a variety of legal vehicles or arrangements. It is the activity, not its form, which gives rise to employee-employer relationships which are regulated by the Act and to which bargaining rights attach. Consequently, under the *Labour Relations Act*, bargaining rights attach to an activity as an employer rather than to a particular employer name or form of employer, and so long as that activity continues bargaining rights continue to exist. As in section 1(4), common-law or commercial law concepts have limited application to section 64 applications. Indeed it is those very concepts which led to the problems which the two provisions are intended to remedy.

8. The term “business” is not limited to a commercial or profit making activity. Sections 1(4) and 64 apply equally to traditional commercial activity and to municipalities, school boards, hospitals and other non-profit undertakings which have employees. It is the labour relations aspect of a “business” which is the focus of sections 1(4) and 64. In that respect, it is the continuity of the “activity” which is significant. “Business” is not necessarily synonymous with a particular group or kind of employees or the “work” they perform. Concomitantly, bargaining rights do not necessarily attach to particular work or employees. Although a continuity of work may be significant, it is not always sufficient to justify a finding that that two or more entities constitute one employer, or that there has been a sale of a business. The focus of the inquiry under both section 1(4) and section 64 is the total economic organization, not just the employees or the work performed (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *British American Bank Note Co.*, [1979] OLRB Rep. Feb. 72; *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130).

9. The purpose of sections 1(4) and 64 of the *Labour Relations Act* is to preserve established bargaining rights, not to extend them or to create bargaining rights where there were none. ...

14. In this case, the Labourers brought to the Board’s attention a decision of the Board (differently constituted) dated July 7, 1992 in Board File No. 0088-92-G, the previous section 126 proceeding involving the Labourers and Kepic Wrecking Inc., which contains the following paragraph;

• • •

7. In his evidence Mr. Stephen Kepic did not deny that the equipment identified by the applicant’s witnesses had been on site. He did deny that the work that was being performed was being performed by Kepic Wrecking Inc. Mr. Kepic was out of the country during the period that this work was being done and he had no knowledge of the project. However he did testify that he has sold certain of his equipment to his son Ronald Kepic who has incorporated a numbered company in order to carry on the same work as his father. Mr. S. Kepic indicated that his son has incorporated a numbered company and is carrying on business as “Kepic Wrecking”. Upon making inquiries Mr. S. Kepic learned that the work in question was performed under contract to a Mr. Mike McGale. None of the persons on site were employed by Kepic Wrecking Inc.

In this case, Ronald Kepic denies that he or his company, 963590 Ontario Inc. c.o.b. as Kepic Wrecking, ever actually purchased any equipment from Kepic Wrecking Inc. Only one of these versions can be accurate. We do not know what evidence the Board had before in Board File No. 0088-92-G, but on the evidence before the Board in this proceeding, and considering the candor with which Ronald Kepic testified, including his explanation why he did not go through with an intended purchase of equipment from his father’s company, we find that there was no such sale of equipment. Nor is there any evidence of any other form of commercial transaction between the two responding employers.

15. However, in section 1(4) or section 64 applications the Board's review of the relationship between the affairs of two or more employers is not limited to traditional or formal corporate and commercial dealings. Accordingly, the test applied by the Board to determine whether or not a sale of a business has occurred is neither mechanical nor easily stated. On the contrary, as the Board observed in *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193 (at paragraph 34):

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business", or "a part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a "new" business which resembles the "old" one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new "parallel" business which only incidentally made use of some of the tangible elements of the predecessor's business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. The Board was not satisfied that there had been a transfer and continuation of the predecessor's business (i.e., the business that he *owns and operates*) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

16. There is no doubt that Ronald Kepic, who for all practical purposes, is 963590 Ontario Inc. c.o.b. as Kepic Wrecking, has been trying to take advantage of the goodwill his father's company, Kepic Wrecking Inc., has developed in the wrecking industry. While Steve Kepic may have advised him against that course, he has done nothing to prevent Ronald Kepic from using the Kepic Wrecking name to his own advantage to further the business of 963590 Ontario Inc. That goodwill is an important asset in the wrecking industry is both generally known and demonstrated by the evidence in this case. Hamilton Car Parks Ltd. wanted to deal with only Kepic Wrecking Inc. and specifically rejected a lower bid because Mr. Leibtag didn't know and didn't like the look of the lower bidder. Further, Ronald Kepic conceded that 963590 Ontario Inc. c.o.b. as Kepic Wrecking has been taken to be Kepic Wrecking Inc. by persons with whom he has had dealings. On his own evidence, it is apparent that Ronald Kepic incorporated and began to operate this numbered company in anticipation of his father Steve's pending retirement, essentially so that he could pick up the Kepic Wrecking Inc. business where his father left off, but without the Labourers. Ronald Kepic has not and will not simply take over Kepic Wrecking Inc. because, as he candidly admitted, he wants nothing to do with the Labourers. In the Board's view, there has in effect been a transfer of goodwill from Kepic Wrecking Inc. to 963590 Ontario Inc. The Board is satisfied that there has therefore been a sale of business, within the meaning of section 64 of the *Labour Relations Act*, from Kepic Wrecking Inc. to 963590 Ontario Inc., which sale took place at or about the time that the numbered company was incorporated; that is, on January 22, 1992.

17. The fact that there has been a sale of business does not necessarily mean that the entities involved do or do not also constitute one employer under section 1(4) of the Act. As the Board observed in *Economy Store Fixtures Limited*, [1992] OLRB Rep. May 575 (at paragraph 18), sections 1(4) and 64 are not necessarily mutually exclusive in their operation or effect and in appropriate circumstances both may apply. Accordingly, and because the effects of a successful section 64 application will not always be identical to a successful section 1(4) application, we find it necessary to deal with the latter in this case as well.

18. Ronald Kepic's managerial role with Kepic Wrecking Inc. is clearly a significant one. (Indeed, the evidence suggests that he is a "key man" within the meaning of that term in the Board's section 64 jurisprudence.) Whatever the respective individual roles and responsibilities of Steve and Ronald Kepic, it is clear that the two responding employers are engaged in the same business, under the same "Kepic Wrecking" name and overall umbrella, under their joint direction or control. The fact that Steve and Ronald Kepic may individually exercise different degrees of direction or control over one than the other does not detract from the fact that they share in the direction or control of the two responding employers. In essence, Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking are one business. Establishing 963590 Ontario Inc. and having it carry on business under the Kepic Wrecking name is merely a step in the process of passing the business from Steve to Ronald Kepic and, at the same time, an attempt to remove the business from an unwanted collective bargaining relationship with the Labourers. Accordingly, the Labourers' bargaining rights are at risk and this is an appropriate case for the Board to exercise its discretion to issue a declaration under section 1(4) of the Act as requested by the Labourers.

19. In the result, just as Kepic Wrecking Inc. is bound by the collective agreement referred to in paragraph 3, above, so is 963590 Ontario Inc. c.o.b. a Kepic Wrecking. Further, Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking are jointly and severally liable for the breaches of the said collective agreement as aforesaid (see paragraphs 7-11 above) and for the damages arising from those breaches.

20. Having regard to the evidence and representations before the Board and the Board's findings as aforesaid, the Board therefore:

- (a) declares that there has been a sale of business, within the meaning of section 64 of the *Labour Relations Act*, from Kepic Wrecking Inc. to 963590 Ontario Inc. c.o.b. as Kepic Wrecking;
- (b) declares that Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking constitute one employer for purposes of the *Labour Relations Act*;
- (c) declares that Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking are both bound by the collective agreement between the Metropolitan Toronto Demolition Contractors Inc., and the Labourers' International Union of North America, and the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089;
- (d) declares that Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking have breached the said collective agreement by failing to perform the work at a job known as "Dare Foods" in Hamilton in accordance with the terms and conditions thereof;
- (e) directs Kepic Wrecking Inc. and 963590 Ontario Inc. c.o.b. as Kepic Wrecking to comply with the full terms and conditions of the said collective agreement;

21. With respect to the measure of the damages arising out of the breaches of the collective agreement herein (for which the two responding employers are jointly and severally liable), the Board finds it appropriate to remit the matter to the parties to give them an opportunity to settle

the issue between themselves. The Board will remain seized with the issue of damages for a period of 90 days from the date hereof. If they are able to settle this issue, the parties should so advise the Board. If they are unable to settle it, the Board will, upon request of any party within that 90 day period, issue a decision with respect to the issue of damages *on the basis of the evidence now before it*. If the Board hears nothing from the parties within 90 days, the Board will assume that the matter has been settled and this proceeding will be terminated.

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**1083-93-U Leo M. Labatt, Applicant v. Employee of Sunnybrook Health Science Centre, Responding Party**

**Unfair Labour Practice - Employee complaining against unknown individual and requesting that Board investigate - Board having no mandate to gather evidence, nor to proceed against "unknown persons" - Facts pleaded, even if true, not making out case for breach of the Act - Application dismissed**

**BEFORE:** *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

**DECISION OF THE BOARD; June 30, 1993**

1. This is an application under section 91 of the *Labour Relations Act*. The applicant, Leo M. Labatt, contends that some unknown individual (but presumably a fellow employee) has contravened the Act by putting a pair of black lace women's panties in his mail bank. In Mr. Labatt's submission, the incident is not a joke.

2. Unlike some tribunals, the Labour Relations Board is not an investigatory agency. Like a Court, the Board adjudicates cases that the parties choose to bring before it. The Board has no mandate to gather evidence, nor is it able to proceed against "unknown persons". More fundamentally, though, it is not evident that, even if true, the circumstances establish a breach of the *Labour Relations Act*. There is no indication that, at the time the incident occurred, Mr. Labatt was exercising rights under the *Labour Relations Act* or engaged in activity protected by the *Labour Relations Act*. Thus, even if the culprit could be identified, and even if the allegations are true, the facts do not make out a case for a breach of the Act.

3. For the foregoing reasons, this complaint is dismissed.

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**3097-92-R International Brotherhood of Electrical Workers, Local 636, Applicant v. Mississauga Hydro-Electric Commission, Responding Party**

**Bargaining Unit - Combination of Bargaining Units - Remedies - Union applying to combine hydro facility's office bargaining unit and outside bargaining unit - Board reviewing relevant principles in connection with combination applications - Board also comparing its approach to combining bargaining units to method used by the Board to structure those units at the point of certification - Board concluding that combining units in this case would, to some extent, facilitate viable and stable bargaining and reduce fragmentation without causing serious labour relations problems - Board directing that the two units be combined and remaining seized to deal with any further remedial relief**

**BEFORE:** *Judith McCormack*, Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

**APPEARANCES:** *Bernard Fishbein*, *David Woolcott*, *Harold G. Vance*, *Jim McNeil* and *Lynn Vet-rano* for the applicant; *R. Budd*, *Ingrid Hann* and *Jo Ann Morello* for the responding party.

**DECISION OF THE BOARD;** June 11, 1993

1. This is an application under section 7 of the *Labour Relations Act* in which the applicant union seeks to combine two bargaining units of employees at the responding employer's hydro-electric facility in Mississauga. For simplicity's sake, we will refer to them as the office unit and the outside unit, although as will become apparent, these terms are not entirely accurate. Both groups of employees work either in or out of the employer's Mavis Road location.

2. The outside unit has been represented by the union since the 1950's, and includes some 163 employees in approximately twenty-four different occupational classifications. These range from electricians, equipment operators, mechanics and labourers to storekeepers, meter readers and foresters. The most current collective agreement between the parties for this unit expired on March 31st, 1993, and at the time of the hearing, the parties were in conciliation.

3. The office unit includes approximately 120 employees in roughly thirty classifications covering such classifications as computer operator, energy management technician, customer service representative, design technician, secretaries, clerks, maintenance caretakers and accounting staff. For this unit, the most recent collective agreement between the parties was signed in March of this year and expires on October 31st, 1993.

4. Section 7 of the Act provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made

by the trade union applying for certification for the other proposed bargaining units.

3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

5. It was not suggested that this case involves either a manufacturing operation or the construction industry. As a result, we turn to the criteria we are required to consider by virtue of section 7(3).

6. The task of facilitating viable and stable collective bargaining in connection with bargaining units is familiar territory for the Board, which has explored this theme extensively in the context of determining appropriate bargaining units at the point of certification. This is true as well for the proposition of reducing fragmentation, since the Board has sought to avoid undue fragmentation in shaping units. Much of the Board's jurisprudence reflects a relatively sophisticated approach to these issues, which has evolved over a number of years of considerable experience. Accordingly, we find it useful to review some of that jurisprudence under section 6 in considering these criteria in the context of combining bargaining units as well.

7. We observe firstly that viability, stability and fragmentation have been interwoven in the Board's determination of bargaining units. A review of the cases indicates that the Board has considered more comprehensive bargaining units and minimizing fragmentation to be key elements in facilitating viable and stable collective bargaining. For example, in *The Board of Education for the City of Toronto*, [1970 OLRB Rep. July 430], the Board expressed the view that fragmentation may make it impossible to have a viable and meaningful collective bargaining relationship:

18. The fact-finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the

unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, [1969] January OLRB Mthly. Rep. 1016.

8. The British Columbia Labour Relations Board set out the same kind of factors favouring broader bargaining units in the *Insurance Company of British Columbia*, [1974] 1 Can LRBR 403 (adopted by this Board in *National Trust*, [1986] OLRB Rep. Feb. 250) where it said at p. 259 as follows:

The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.

\* \* \*

A second administrative factor, this one clearly in the interest of both employer and employees, is the matter of *lateral mobility*. The presence of several bargaining units, each with their seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.

\* \* \*

The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has developed a wage structure whereby all the positions across every division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees.

\* \* \*

Another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately.

9. In *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, the Board noted that in striving to create a viable structure for collective bargaining, a broadly based bargaining unit offers several advantages over a fragmented structure, and went on to elaborate on the undesirable effects of fragmentation, including the increased risk of work stoppages:

15. Organizational concerns are not the only forces that shape bargaining units. The Board must also strive to create a viable structure for ongoing collective bargaining. See *Usarco Limited*, [1967] OLRB Rep. Sept. 526; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250; and *Insurance Corporation of British Columbia*, [1974] 1 CLRBR 403 (B.C.). From this perspective, a broadly based bargaining unit offers several advantages over a fragmented structure.

16. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations and may be further increased by competitive bargaining between two trade unions. The potential for mischief is greatest when the work performed in two or more units is integrated. In these circumstances, whenever one group strikes, other employees who are functionally dependent upon struck work are deprived of employment, though they may stand to gain nothing from the strike because their agreement has just been renewed. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work, although a concerted refusal to cross a picket line, by employees who are not entitled to strike, is an illegal work stoppage.

17. There are other drawbacks to a multiplicity of bargaining units. Each unit is likely to become an enclave surrounded by legal barriers - designed to enhance [sic] the job opportunities of employees within the walls - that impede the mobility of employees. Restrictions on mobility may entail significant costs for an employer whose practice is to frequently transfer employees between jobs that fall in different units. In some cases, these barriers may close natural lines of job progression to the detriment of all concerned. A fragmented bargaining structure also inevitable [sic] spawns jurisdictional contests over the allocation of work among units, disputes which in the long run benefit no one. And a proliferation of bargaining units entails the time and trouble of negotiating and administering several collective agreements. From the perspective of an employer with centralized control over labour relations, there is an unnecessary duplication of effort. *All of these concerns - work stoppages, restricted employee mobility, jurisdictional disputes and administrative costs - favour consolidated bargaining structures, although the force of each vector varies from case to case.*

(emphasis added)

10. Similarly, in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, the Board suggested that fragmentation could contribute to labour management problems, tension within and between bargaining units, and an escalation of industrial conflict, and described fragmentation as “a recipe for industrial unrest - if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unraveling”. And in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7, the Board noted that fragmentation could result in a weak employee presence at the bargaining table.

11. In other words, it is well established in the Board’s jurisprudence that facilitating viable and stable collective bargaining in the context of bargaining unit determinations is strongly connected to minimizing fragmentation. In certification cases, however, this is tempered by an opposing concern that bargaining units not be described so broadly that they impede access to collective bargaining. In *Ryerson, supra*, the Board noted that assisting employees to join together for collective bargaining was a fundamental objective of the *Labour Relations Act*, and that as a result, the Board has been reluctant to establish units that are so broadly based that they defy organization:

14. A trade union may experience insurmountable difficulties in trying to organize employees in a unit that is broadly defined to embrace employees who are geographically dispersed or perform substantially different jobs. As one of the fundamental objectives of the *Labour Relations Act* is to assist employees to join together for collective bargaining, this Board has been reluctant to establish units which are so broadly based that they defy organization. See *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7. The public policy of facilitating organization is a two-edged sword. A trade union may propose a unit defined so as to leave unrepresented a group so small that they have no real chance of entering the world of collective bargaining alone. In these circumstances, the Board expands the proposed unit to include the employees in question, even though the result may be to dilute support for the union to the point that the application is dismissed. See *Board of Education for the City of North York*, [1982] OLRB Rep. June 918 at paragraph 7.

\* \* \*

19. The design of bargaining units becomes even more complex when the focus of attention is

expanded to include not only ongoing collective bargaining but also organizational concerns. The optimal unit for long-term bargaining may be larger than the grouping within which a trade union can be reasonably expected to obtain the level of employee support necessary for certification in the short-run. In other words, there is an inherent stress lurking within the concept of an appropriate bargaining unit because it performs two very distinct functions. How has the Board responded to this industrial relations conundrum? The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been “hard pressed” not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number of employees than worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

12. In the same vein, the Board said in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330:

In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all.

13. Indeed, in *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the Board expressed the view that “[w]here, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization”.

14. Much of this discussion is useful in the context of section 7 as well. Indeed, in *Olympia & York Developments Limited*, April 8, 1993 (unreported) the Board reiterated some of these views in the context of an uncontested combination application:

7. This bargaining unit description consolidates the above-mentioned employee groupings into a single unit for collective bargaining purposes. It avoids fragmenting a group of building service workers into two legally distinct units, each of which would encompass only a handful of employees. And, of course, if there were two separate units, that could mean: separate bargaining, separate collective agreements, separate seniority regimes, a strike of one or other of these employee groupings at different times, and potentially two trades unions, should one or other of these employee groups choose to displace the Transit Union (as has happened before in this organization). This is not a recipe for stable or effective collective bargaining, nor (as noted) did the employer appear at the hearing to substantiate any concerns it might have about the proposed consolidated bargaining structure.

At the same time, it is also evident that the Board's approach to combining bargaining units must be somewhat different than the method the Board uses to structure those units at the point of certification. Although the criteria in section 7(3) echo some of the themes addressed by the Board under section 6, there are some notable absences. Section 7(3) does not employ the language of appropriateness set out in section 6, and there are obvious differences in the kinds of factors relevant even to viability. For example, the Board may not have the same concern that larger bargaining units might impede the right of employees to organize themselves in a combination application, when access to collective bargaining is not an issue. This brings the problems associated with frag-

mentation and its impact on viable and stable collective bargaining into sharper focus. Indeed, in the absence of this concern, the Board's views on the undesirable impact of fragmentation may suggest a more marked preference for larger units. Likewise, the Board's approach to displacement applications for certification is shaped to some extent by specific considerations with respect to gerrymandering, which may take a different form in the context of combination applications.

15. Notable by its absence in section 7(3) as well is any mention of community of interest, another factor the Board has considered in determining the original contours of bargaining units. In *Ryerson, supra*, the Board defined this phrase in terms of the extent to which employees share bargaining objectives. Criteria for assessing community of interest were set out by the Board in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 as follows:

- 1) nature of work performed;
- 2) conditions of employment;
- 3) skills of employees;
- 4) administration;
- 5) geographic circumstances;
- 6) functional coherence and interdependence.

It is fair to say that in recent years, the Board has recognized that community of interest is a matter of degree, rather than a fixed dividing line between those employees who share a community of interest and those who do not. In addition, less emphasis has been given to the community of interest indicia standing alone, as the Board has preferred the more integrated and relative approach to bargaining unit determination expressed in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

We might make an additional but related observation. We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive and time-consuming process for deciding a relatively simple question: *does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.*

16. As the Board noted in *Ryerson, supra*, the concept of a community of interest does not necessarily favour larger or smaller units. In addition, some of the conventional wisdom with respect to the types of employees who share bargaining interests is now open to question. As the Board observed in *The Hospital for Sick Children, supra*, real life collective bargaining experience has indicated that it may be possible to group together for bargaining purposes employees with quite diverse skills, education, training, positions and aspirations:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simply, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers,

economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978 OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

17. The fact that community of interest is not an explicit criterion in section 7(3) appears to reflect, to some degree, both an increasing recognition in the Board's jurisprudence that considerable diversity can be accommodated within one bargaining unit, and the Board's willingness to question what may be obsolete assumptions with respect to shared bargaining interests. It is also true that in a combination case where there are one or more bargaining units which have existed for some time, it may be more difficult to determine whether there are any inherent conflicts in bargaining interests and objectives. This is because the Board's initial structuring of the bargaining unit or units at certification may have had an impact which obscures any intrinsic compatibility or conflict. As the Board noted in *Ryerson, supra*, inclusive bargaining units tend to erode differentials between employees. Similarly, separate bargaining units may encourage a divergence of interests and working conditions. In other words, an attempt to measure any natural community of interest in a combination application may be distorted by the Board's original determination.

18. On the other hand, we also note that the criteria set out in section 7(3) are inclusive, rather than exhaustive, and that community of interest has been considered an aspect of viability in the Board's jurisprudence. While we think it consistent with both the language of section 7(3) and the development of the Board's jurisprudence and experience to give less weight to the community of interest factor than previously, there may also be cases where the interests of employees are so strongly discordant that this may have a significant impact on viability or stability, or may create serious labour relations problems. To the extent, then, that a lack of community of interest is so fundamental that it affects the criteria explicitly set out in section 7(3), it may still be part of the Board's consideration.

19. The employer in this case urged the Board to adopt an approach to section 7 in which bargaining units would not be combined unless the applicant could point to serious labour relations problems in the existing bargaining framework. Implicit in this proposition is the idea that since the Board will have initially determined that one or more of the units was appropriate, there should be some significant threshold for an applicant to overcome in terms of subsequent combination. Although at first glance this approach is not without some advantages, further examination reveals a number of flaws.

20. At the outset, it is important to note that the Board has acknowledged the elasticity of the concept of the appropriate bargaining unit. Rather than seeking to ascertain the one perfect bargaining unit in each situation, it has recognized that there may be more than one equally appropriate bargaining unit in a particular case. In *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board noted as follows:

21. None of this is new of course. The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situa-

tion there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of “appropriateness”, with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit. Full-time and part-time employees can be segregated, but there are many situations where they have not been.

If there can be more than one appropriate unit, the Board’s determination at the certification stage may not carry as much weight in a subsequent combination application.

21. In addition, certifications for existing units have taken place over a span of almost fifty years. A number of them were based on assumptions, for example with respect to the part-time employees, which have come under increasing scrutiny in the wake of changing social and economic conditions. Moreover, as we noted above, some bargaining units may have been shaped to a very significant degree by factors more relevant to certification than combination, such as the concern that larger bargaining units may impede organization. It is also true that bargaining unit determinations in certification applications take place in a context in which the issues are often framed by the parties with reference to the impact it will have on the chances of certification. The parameters established by the parties in this regard may affect the ultimate decisions. Similarly, many bargaining unit determinations are also based on agreement by the parties, and the Board has often been content to found its decisions in this area on such agreements, even to the point of accepting units it would not normally establish itself. Finally, many existing bargaining units are based on historical anomalies. For example, at one time, meat cutters in the retail sector had their own union and a quasi-craft status. When that union amalgamated with another, the pattern of separate organization continued to some extent, so that it is not uncommon to see units consisting of meat department employees only, a somewhat unlikely unit to be determined by the Board in the absence of this history. These kinds of historical anomalies can also be found in the printing industry, the health care sector, and so forth.

22. As a result, the current bargaining unit landscape represents a veritable hodgepodge of rational and sound structures, outdated assumptions, specific organizing patterns, historical anomalies, individual agreements by parties, and Board determinations in a context where the parameters of litigation may have been distorted by strategic concerns. To this extent, it may be difficult to marshal the status quo in aid of an approach to combination orders which requires the applicant to meet a significant threshold.

23. We find it instructive as well that the language of section 7(3) does not suggest that the combination of units is to be resorted to only as a remedy for a problem of some kind. A comparison with the phrasing of other provisions such as section 41(2) highlights this difference. That section sets out criteria which must be met for the Board (as opposed to the Minister) to direct the arbitration of a first contract. Included is a stipulation that the collective bargaining process has been unsuccessful for a number of reasons, including several identified problematic situations. This somewhat more remedial focus is absent from section 7.

24. In addition, section 7(3) uses words like “the extent to which”, “facilitate” and “reduce”. “Facilitate” is defined in *The Shorter Oxford English Dictionary* (Oxford: Clarendon Press 1978) as “to render easier; to promote, help forward”. This language suggests that it is not necessary to establish an existing problem to succeed in an application, but only that the combined unit might make viable and stable bargaining easier, for example. We note as well that section 7(3)(b)

refers only to fragmentation, and not undue fragmentation. This also implies a fairly low threshold for an applicant.

25. Counsel for the applicant referred us to cases from British Columbia, including *B. C. Ice and Cold Storage Ltd.*, [1978] 2 Can LRBR 545, where the British Columbia Labour Relations Board established two preconditions for an application for consolidation to succeed: one of the units must no longer be appropriate, and there must be some resulting jeopardy to the employer, potential or present. However, as counsel pointed out, the jurisdiction employed by the British Columbia Board to combine units derives from a general reconsideration power, rather than a specific statutory mandate which sets out criteria. In addition, the British Columbia power is used to consolidate units where there are different bargaining agents. Since the effect of combination in these circumstances is to extinguish the bargaining rights of one of the unions, it is not surprising that the British Columbia Board would be inclined to a narrow view of this exercise.

26. We were also referred to two cases from Saskatchewan, including *Canada Safeway Limited*, (1992) First Quarter, Sask. Labour Report, p. 47 in which the Saskatchewan Labour Relations Board found the *B. C. Ice* test to be too restrictive. It indicated that the central issue was whether the consolidated unit applied for would be appropriate, not whether one of the existing units was inappropriate. It then adopted the approach set out in *SJBRWDSU v. OK Economy Stores Limited*, [1990] 7 Can LRBR 286, where the same Board listed a number of factors in its consideration of whether a consolidated bargaining unit would be appropriate, including viability, community of interest, organizational difficulties, industrial stability, wishes or agreement of the parties, the organizational structure of the employer and the effect on its operations, and the historical patterns of organization in the industry. The Board went on to suggest that two of those factors would receive particular emphasis in combination applications: firstly, whether the employees in the proposed unit share a sufficient community of interest to warrant consolidation, and secondly, whether the consolidated unit will promote industrial stability. At the same time, because the bargaining unit is being considered in the context of consolidation rather than certification, the Board will begin with the premise that an existing unit is appropriate and will look to whether the historical bargaining practices of the parties indicate a community of interest in a larger unit which is appropriate, given the considerations referred to above.

27. We find this approach somewhat unsatisfactory in the context of section 7(3) as well. For one thing, if the premise that an existing unit is appropriate simply reflects the fact that this was the configuration determined at the time of certification, this is of limited value for the reasons we set out earlier. Similarly, although we do not discount that some of the factors listed by the Saskatchewan Board may turn out to be useful in the Ontario context to the extent they affect viability and stability, there are a number of caveats worth noting at this time. Like the British Columbia provision, the Saskatchewan section is a more generalized power of reconsideration rather than a specific mandate, and there are significant differences in wording. In this regard, we have already commented on the issue of community of interest in terms of this Board's experience and the language of section 7(3). In addition, while we think that this is some obvious merit in considering on the employer's organizational structure and the effect on its operations under section 7(3), in considering the weight of this we cannot ignore the fact that section 7(4) focuses explicitly on the employer's operations in manufacturing in a way the Legislature did not see fit to apply more generally in section 7(3). Similarly, while we agree that the parties' historical bargaining practices may be of some value, it must be remembered that in Ontario, a party may propose changing the shape of the bargaining unit in negotiations, but cannot press the issue to an impasse without running afoul of the duty to bargain in good faith. Thus where the parties have agreed on a bargaining pattern different from that determined at certification, it may well be very instructive; where the parties have been unable to reach agreement, this fact may be of somewhat limited value.

28. Having carefully reviewed these cases, we are of the view that it is not appropriate to set up a particular onus in the face of the specific criteria set out in section 7(3). The test in the Ontario provision has already been provided by the Legislature. While that test is not exhaustive, and while our understanding of that test may be enriched by the Board's extensive experience in shaping bargaining units to date, the central issue before us is still whether an application meets that test. Accordingly, we find that we must consider whether the consolidated unit sought would, at least to some extent, facilitate viable and stable collective bargaining, reduce fragmentation, or cause serious labour relations problems.

29. We cannot leave this more general discussion of section 7(3) without commenting on the issue of bargaining power. There is no doubt that the contours of a bargaining unit have a significant impact in this regard, as the Board noted in *Kidd Creek Mines, supra*. And just as the parties' positions in certification bargaining unit disputes are often influenced by tactical issues relating to increasing or decreasing the chances of certification, it would not surprise us if combination applications are brought and resisted against a backdrop of strategic considerations relating to bargaining power. We do not rule out the relevance of some of these issues, particularly as they may relate to organizational difficulties in a sector. For example, a bargaining unit may be so small and weak that it cannot negotiate in any meaningful way, and the economic sanctions contemplated by the Act remain a theoretical option only. In that case, a larger unit might well facilitate viability. At the same time, we think that considering bargaining power as a factor in isolation is somewhat unlikely to be a fruitful line of inquiry in this context.

30. With this in mind, we now turn to the facts of this case. The evidence indicates that although the collective agreements between the parties are very similar, the outside agreement is significantly better from the employees' point of view in a number of areas. According to Harold Vance, a business agent for the union who until recently represented both units, this has created substantial problems in bargaining. The office unit is perennially attempting to catch up with the outside unit in terms of a variety of contract benefits and working conditions, and has not been successful. This is a source of dissatisfaction for office employees, who in the last round of bargaining rejected two memorandums of agreement recommended by the union and did not settle until the employer agreed to close the gap between the units on standby pay. To the extent that gains are made for the office employees with respect to providing them with similar benefits to the outside unit, the timing of the respective collective agreements means that those gains are promptly eroded by the outside unit's negotiations.

31. Mr. Vance also described a pay equity issue between the units which has led to difficulties in the office unit. The compensation of thirty-three employees in the office unit is tied to that of comparators in the outside unit. When those comparators get increases in their compensation, so do the thirty-three office employees, several months in advance of other employees in the office unit who find this upsetting. In addition, the linking of their increases to the outcome of the outside unit's negotiations means that their interest and views on the office unit negotiations are substantially different than those of other office unit employees.

32. Although we do not doubt that these matters have created some difficulties for the applicant, we find the evidence a little overstated in this regard. Nonetheless, it does appear that combining these units would serve to alleviate some persistent irritants in the labour relationship.

33. Both parties led considerable evidence with regard to the differences between the two collective agreements. The union's evidence was largely directed at attempting to show that discrepancies in provisions such as probationary periods, union membership and meal allowances were not based on rational distinctions between the two units and their working conditions, and thus

that inequities had resulted from the division of employees. The employer sought to show that the different collective agreement provisions reflected such divergent communities of interest between the two groups of employees that combining them would create serious labour relations problems. In this connection, the employer also argued that the two-unit design was positive and facilitated good labour relations because each group had a different frame of reference and different concerns which management could more specifically address.

34. We do not find it necessary to recite the evidence that was led by the parties at great length. Suffice it to say that the degree of diversity in terms of the usual community of interest criteria *within* each bargaining unit was almost as great as the diversity *between* them. For example, there are highly skilled and relatively unskilled employees in each unit and the nature of work performed within each unit varies widely. In addition, the two maintenance caretakers in the office unit have jobs and working conditions more akin to many of the employees in the outside unit, and a number of employees in the outside unit rarely leave the premises. It was evident that this diversity within each bargaining unit had been successfully accommodated, suggesting that the different classifications spread over both bargaining units could be as well. Indeed, the all-employee bargaining units the Board routinely certifies in other situations puts this case into perspective. We observe as well that the employer deals with both units through the same management structure, with the same management committees and so forth, although the bargaining units are represented by separate union executives and separate negotiating committees, a relatively recent development.

35. The union also argued that the employer's approach to community of interest was outdated. In counsel's opinion, the distinctions drawn by the employer between the two groups of employees reflected an "Ozzie and Harriet" view of the world that was out of place in 1993, and in support of this proposition, he referred us to *Motor Coach Industries Limited*, [1992] OLRB Rep. June 744.

36. *Motor Coach, supra*, provides a specific example of the kind of re-examination of community of interest we referred to earlier. There, the applicant sought an "all employee" bargaining unit, while the respondent took the position that there should be separate units for office and clerical staff on the one hand, and plant employees on the other. The Board reviewed previous cases referring to a long established policy of separating plant and office employees on the basis of their divergent interests, and then commented on the changes in the workplace since the policy had developed:

13. The "policy" in question is one which had fully matured more than forty-five years ago. In the state of the reported jurisprudence, we can only speculate on the facts and circumstances which might then have led the Board to articulate a "policy" that office workers would be excluded from a plant unit "except in the most exceptional circumstances." On the face of it, the basis of these pronouncements was its assessment of community of interest. We have no difficulty imagining that circumstances in which plant and office employees shared an adequate community of interest were "exceptional" in the workplaces being organized in the 1940's. It would have made sense for the Board to make it very clear that arguments for inclusion of office workers in the units sought by trade unions were unlikely to succeed, if that was its experience. We do not think that the Board's statements about the conditions of the 40's and 50's can be taken as an undertaking that the Board would continue to apply an "exceptional circumstances" test into the 90's despite changes in the nature of the workplaces being organized.

14. The nature and kinds of employment and the ways in which jobs are created, staffed and valued have all changed considerably in the last forty-five years. The fact that one person's work area is described as an "office" and another's is not does not always carry with it the same implications as it did forty-five years ago. We imagine that a workplace like this one, where the same pay scheme applies equally to office and "plant" employees and where office employees

can apply for and are transferred to “plant” jobs and *vice versa*, would have been “most exceptional” in the 40’s and 50’s. We are not confident that that is so today.

37. We think there is some merit to the proposition that the case before us may also be illustrative of the process reflected in *Motor Coach, supra*, where a changing social context highlights the increasing fragility of distinctions which were earlier thought to be self-evident. In any event, taking the evidence in this regard as a whole, and keeping in mind our previous comments on the weight to be placed on the issue of community of interest, there is nothing in this situation which suggests the kind of fundamental divergence of interest which could threaten the viability or stability of a combined unit or represent a serious labour relations problem.

38. Counsel for the employer also argued that the parties had had a mature and lengthy relationship which had been free of strikes and lockouts for almost twenty years, and that the Board should not fix what was not broken. This is an argument which has some value as well, in the sense that any new bargaining unit configuration represents something of an unknown quantity. However, we have four observations in this regard. Firstly, viability and stability are not necessarily synonymous. A small unit which is unable to mount an effective strike may appear stable, but not necessarily viable. We also refer to our earlier remarks with respect to the language of section 7(3), which on its face suggests that an applicant need not establish problems with the existing structure, so long as the unit sought meets the criteria under the Act. Thirdly, the advantages of larger units generally have been so well documented in the Board’s jurisprudence that combination is not quite the risk that it might otherwise seem. Finally, we note that the union presented us with a list of thirty-eight hydro-electric facilities in Ontario, in which office and outside employees are included in one unit. On the other hand, the employer provided us with a list of twenty-four facilities which have separate units for office and outside employees. Nonetheless, this evidence does provide some level of assurance for the employer’s concerns.

39. The union argued that combining these units would reduce fragmentation, albeit from two units to one. Of course, it cannot be said that there is the kind of fragmentation here which is likely to give rise to some of the more extensive problems referred to earlier in the Board’s cases. However, those cases do suggest that combination in this situation would, at least to some extent, facilitate lateral mobility of employees and the achievement of a common framework of employment conditions, two of the factors set out in *Insurance Company of British Columbia, supra*, and adopted by the Board in *National Trust, supra*, in discussing fragmentation.

40. In summary then, our review of the criteria in section 7(3) in regard to the particular circumstances of this case leads us to the conclusion that combining these units would, at least to some extent, facilitate viable and stable bargaining and reduce fragmentation without causing serious labour relations problems. As a result, we direct that the two existing bargaining units be combined into one.

41. The union also asked us to extend the date of the office unit’s collective agreement to whatever date the parties agreed upon in their current negotiations for the expiry of the outside unit’s collective agreement, and to then allow the parties to sort out any problems in negotiations. The employer requested that if we combined the units, we remit the matter back to the parties at this time to see if they could work out any implementation problems. We find the employer’s approach preferable, at this time, and we so direct. We remain seized to deal with any further remedial relief.

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**0956-92-G National Elevator and Escalator Association, Applicant v. I.U.E.C., and its Locals 50, 90 and 96, Responding Party**

**Construction Industry - Construction Industry Grievance - Board finding issues concerning administration of pension plan to be arbitrable under terms of the various collective agreements between the parties - Board finding it appropriate for dispute to be determined under provisions of Ontario, rather than Nova Scotia collective agreement and that Board having jurisdiction to determine issue raised in employer's grievance - In view of parties' agreement on merits of grievance, Board finding that Board of Trustees not required to accept contributions to Pension Fund on behalf of employees by employers that are not parties to valid collective agreement**

**BEFORE:** *Roman Stoykewych*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

**APPEARANCES:** *R. Ross Dunsmore*, *Morgan Bronwen* and *Andrew Reistetter* for the applicant; *P. E. Verrege* for the responding party.

**DECISION OF THE BOARD;** June 9, 1993

1. This is an application under section 126 of the Labour Relations Act, in which the employer, the National Elevator and Escalator Association, seeks declaratory relief with respect to the interpretation of the provisions of the Declaration of Trust of the Canadian Elevator Industry Pension Fund (hereinafter "Declaration of Trust") and the Plan of Benefits of the Canadian Elevator Industry Pension Plan (hereinafter "Pension Plan"). The provisions of Article 126(1) of the Act are as follows:

Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 45, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

2. In its grievance dated June 23, 1992, it is asserted by the employer that under the terms of the Declaration of Trust pursuant to which the Pension Plan is administered, no contributions are to be accepted from an employer unless and until that employer becomes a party to a collective agreement between the parties. The trade union contests the jurisdiction of this Board to adjudicate upon this matter. It is its position in this respect that the subject matter of the grievance is not properly within this Board's territorial jurisdiction since, it claims, all matters relevant to the collective bargaining relationship giving rise to the grievance transpired in Nova Scotia.

3. In order to appreciate the nature of the disagreement between the parties and the objection taken to our jurisdiction, it is useful to review some of the institutional and contractual arrangements developed by the parties in their many years of collective bargaining. Throughout the 1950's and early 1960's the parties, the International Union of Elevator Constructors and the National Elevator and Escalator Association, had bargained collectively at the national level and had concluded a series of collective agreements concerning the various terms and conditions of employment on that basis. Emerging from this national arrangement was a contributory Pension Plan which was, in turn, to be administered by a Pension Trust. The Board of the Trust was composed of equal numbers of representatives of the union and the employer's association, and in practice, the bargaining committees of the two parties to collective bargaining generally overlapped with the membership of the Board of Trustees. Although the nation-wide bargaining structure broke down in 1967, and thereafter provincial agreements were concluded, both the Pension Plan

and the Pension Trust continued to operate at the national level. Thus, issues relating to the administration of the Pension Plan, although they are implemented through the various provincial arrangements between the employer and the trade union, continue to be determined at the national level by a single Board of Trustees.

4. Certainly at the outset, the circumstances giving rise to the present application had their origin in the province of Nova Scotia, and in particular, with respect to the collective bargaining relationships entered into by North East Elevator Ltd. (hereinafter referred to as "North East"). North East, a company engaged in elevator construction, operates exclusively in the province of Nova Scotia. In 1988, North East became a member of the National Elevator and Escalator Association by virtue of its entry into a collective agreement with the trade union. On that basis, remittances on behalf of the employees of North East were accepted by the Trustees of the Pension Plan as contributions to the Pension Fund. However, by 1992, the collective agreement between it and the trade union lapsed, and as a result, North East ceased to be a member of the National Elevator and Escalator Association. Nevertheless, North East continued to make remittances to the Pension Fund with respect to its employees. The present dispute concerns contributions of that sort, and more particularly, whether the Trustees are authorized to accept remittances from a non-member employer with respect to its employees.

5. The matter first came to a head at a meeting of the Trustees of the Plan on May 19, 1992 held in Toronto. At first, the specific issue of the status of North East and its ability to make remittances to the Plan was raised and discussed. However, no agreement could be obtained as to the manner in which it was to be disposed and as a result, the issue was tabled. Thereafter, however, the more generic issue of whether contributions would be accepted from non-member employers was raised by the management representatives. The Minutes of that meeting record that the employer representatives advanced the following resolution:

RESOLVED: THAT until such a time as an Employer becomes a party to a valid Collective Agreement as required by the Trust Agreement, the Trust will not accept any contributions from that employer.

That resolution as well was discussed, a vote was taken which resulted in a tie, and the Board members then agreed to have the issue arbitrated. Although no consensus upon a specific arbitrator was reached, it was nonetheless agreed that the disputed matter would be referred to the Office of Arbitration of the Ontario Ministry of Labour for the purpose of having an arbitrator appointed. The applicant duly filed a grievance pursuant to the collective agreement operative in Ontario, and then referred the matter to the Board pursuant to the provisions of section 126. As indicated earlier, the trade union takes the position that the Board lacks jurisdiction to hear the present matter on the grounds that all the events giving rise to it occurred in Nova Scotia, that the employer does not operate in Ontario, and that the employer does not employ any Ontario employees.

6. In Ontario, the collective bargaining relationship between the parties is regulated by the terms of the "Ontario Provincial Agreement". Article 17.01 of that agreement provides for the establishment of the Pension Trust, with a composition as set out above, and makes provision for a pension fund to be known as the "Canadian Elevator Industry Pension Plan". Article 17.02 of the Ontario collective agreement reads as follows:

The Board of Trustees shall have full authority and discretion to adopt the Declaration of Trust and Plan of Pension Benefits which shall be part of the collective Agreement and binding on all the parties signatory to this agreement.

7. The Declaration of Trust, in turn, sets out the various obligations and powers of the

Trustees to administer the Pension Fund and the manner in which those determinations are to be made. Of considerable significance here are the dispute resolution provisions set out in Article VIII, Section 1 of the Declaration of Trust:

In the event the Trustees cannot decide any matter (including the adoption of rules and regulations and amendments to the Plan) or resolve any dispute because of a tie vote, or in the event decisions cannot be made because of a lack of a quorum at two successive meetings of the Trustees, then and in either such events the Trustees shall submit such matter to arbitration in accordance with the terms of the Collective Agreements.

8. The definition of “Collective Agreements” is set out in Article I Section 1 of the Declaration of Trust:

The term “Collective Agreements” as used herein shall mean the agreements covering the terms and conditions of employment in force from time to time between the Union and the Employers.

9. It is on this basis that the employer argues that both the Declaration of Trust and the Pension Plan form part of the collective agreement between the parties in as much as those documents have been incorporated by reference into the collective agreement. The Board has little difficulty in accepting this proposition, as it is clear from the arbitral caselaw that a collective agreement may be comprised of more than one document, and that “ancillary documents” such as pension plans and health and welfare benefit schemes are enforceable under the terms of a collective agreement when the parties so provide, whether expressly or by implication. [*Re Ontario Paper Co. Ltd.*, (1987) 32 L.A.C. (3d) 346 (Solomatenko); *Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Association*, (1980), 24 L.A.C. (2d) 319 (Christie)] The present collective agreement expressly provides that the Pension Plan and Declaration of Trust documents, setting out the substance and the administrative procedure of the pension scheme in place between the parties, are part of the collective agreement between them, and then, in the Trust document, makes provision for the arbitration of differences arising in the administration of the plans through the arbitration provisions in the various collective agreements. In that general respect, then, we find that issues concerning the administration of the pension plan are arbitrable under the terms of the various collective agreements between the parties.

10. Nevertheless, the resolution of the incorporation issue does not determine the more difficult question of whether it would be appropriate for the matter to be determined under the provisions of the Ontario, rather than the Nova Scotia collective agreement. According to counsel for the employer, the parties are compelled to have the matter determined in Ontario as a result of the operation of the provisions of the Trust Agreement that set out the Province of Ontario as the “situs” of the Trust. Article XII, Section 3 of the Trust Declaration states:

This Declaration of Trust is accepted by the Trustees in the City of Toronto in the Province of Ontario and such place shall be deemed the situs of the Trust Fund created hereunder. All questions pertaining to the validity, construction and administration shall be determined in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

11. It is urged upon us by counsel for the employer that the issue of acceptance of remittances constitutes a “question pertaining to validity, construction and administration” of the Pension Plan, and that accordingly, that matter should be determined according to the laws of Ontario. It is the further assertion of counsel that the situs provision has the additional effect of requiring the matter to be disposed of according to the provisions of the Ontario collective agreement. We cannot agree that the situs provision of the Trust document has a jurisdiction-granting effect for purposes of determining the arbitrability of grievances. As indicated above, in the documents that comprise the collective agreement, the parties have expressly set out a scheme pursuant

to which differences concerning the interpretation and administration of the Pension Plan are to be arbitrated. Although we accept that decision-making with respect to the Fund operates at a national level, the Trust Declaration provides that matters concerning the administration of the Pension Fund that cannot be resolved by the Board are to be dealt with by submitting the matters to arbitration under the provisions of the various "collective agreements", which are further defined in the plural in Article I, Section One of the Trust Agreement.

12. The employer's interpretation of the situs provision, by contrast, would render the plural language used in the agreement meaningless, since it would necessarily imply that by designating Ontario as the situs of the Trust Fund, the parties intended all matters concerning the administration and interpretation of the Pension Plan in dispute between them, irrespective of their origin, to be arbitrated under the provisions of the Ontario collective agreement. Moreover, such a result would not be congruent with sensible labour relations since it would require that any dispute, no matter how closely linked it may be with the specific circumstances of a given province, would be heard in Ontario. In our view, it is much more likely that the situs provisions were agreed upon by the parties in order to identify the location of the trust for such matters as taxation and trust administration. Additionally it may be that these provisions would require arbitrators in provinces other than Ontario to apply the substantive law of Ontario in the course of their construction of the terms of the Pension Plan, (a matter which we expressly decline to decide). Nevertheless, we do not understand those provisions to override the clear language of the agreement which contemplates the referral of grievances to a plurality of provincial fora. Thus, the situs provisions of the Trust agreement do not compel the parties to have this matter adjudicated under the provisions of the Ontario collective agreement and accordingly, are of no assistance to the employer in establishing the jurisdiction of this Board to hear this matter.

13. The employer also argues that the matter is one that is properly before this Board in light of the steps the Trustees have taken to have the matter heard in the Ontario jurisdiction during the consideration of the matter at the May 19, 1992 meeting of the Board of Trustees of the Pension Plan. In effect, the employer argues that the trade union has attorned to the Ontario jurisdiction. In particular, it is stressed that the parties have agreed to have the matter arbitrated, and in so doing, chose to have it arbitrated in Ontario under the aegis of the Ministry of Labour's Office of Arbitration. In addition, it is noted that the motion proposed by the employer representatives that gave rise to the present grievance was not one which addressed the specific circumstances of North East, nor did it entail a ruling as to North East's status to make contributions under the Plan, as would be entailed by a determination with respect to the earlier motion advanced by the employer representatives. Rather, the issue was characterized by the parties in the minutes as a discussion of a "general matter". Bearing in mind those considerations, we were urged to take jurisdiction over the matter.

14. The Board is cognisant that, as a general rule, parties are unable to grant to an arbitration panel jurisdiction under a collective agreement that it otherwise would not possess through the expedient of a collateral agreement. In our view, the steps taken at the May 19 meeting do not possess most of the requisite formal characteristics of a collective agreement that would empower an arbitration panel to hear the matter. To mention a single example, the arrangement to have the matter heard in Ontario was made by the Trustees of the Plan, not by the parties themselves. In that respect, the agreement to arbitrate in Ontario cannot be understood even notionally as an "amendment" to the collective agreement that would authorize the parties to proceed in Ontario. Accordingly, standing alone, the agreement to arbitrate in Ontario cannot grant this Board jurisdiction to hear the matter since, of necessity, the jurisdiction of an arbitration panel must arise from the terms of the collective agreement.

15. Notwithstanding this finding, we are of the view that the present collective agreement itself contemplates the parties possessing the power to agree to a forum and that, in the present circumstances, the parties have utilized that power pursuant to the provisions of the collective agreement. In this respect it is important to note that the grievance is in the form of a “policy” matter, in which the issue to be determined is the appropriateness of a rule of general application throughout the country. Although originating in the specific circumstances of a collective bargaining relationship in Nova Scotia, the Board is of the view that in re-framing the issue in general terms, the Trustees have converted the matter to one of rule-making, a matter over which they have ample contractual authority. For example, in Article IV Section 3 of the Declaration of Trust, the Trustees are granted the general power to “establish such rules and regulations necessary to the effectuation of the purposes of this Declaration of Trust and not inconsistent with the terms hereof”. As indicated above, Article VIII Section One of the Declaration of Trust expressly contemplates a referral to arbitration under collective agreements of issues relating to the “adoption of rules and regulations and amendments to the Plan” in circumstances where no agreement can be reached by the Trustees.

16. Nevertheless, the referral provision gives no direction with respect to which agreement a particular matter is to be referred. In our view, given that the Declaration of Trust expressly contemplates the arbitration of general rule-making issues that, in their very nature do not attach specifically to a single province, and given that no direction is provided as to where such matters are to be heard, it is reasonable to imply a power in the Trustees to choose their forum of convenience. To imply otherwise would entail a finding that there is no jurisdiction to hear policy issues, or that they are compelled to be heard in a particular province. Neither of these alternate assumptions, as explained above, are tenable under the terms of this agreement. Accordingly, we find that the Trustees exercised their contractual power to determine the jurisdiction in which the grievance was to be arbitrated by agreeing to have the matter referred to the Ontario Ministry of Labour’s Office of Arbitration for adjudication.

17. Finally, it is necessary to consider whether the arbitration provisions of the Ontario collective agreement authorize the hearing of the matter. That is to say, although we have found that the parties have granted the Trustees a power to choose their collective agreement in cases of policy grievances, nonetheless in order for the matter to be arbitrable, the collective agreement chosen must itself provide the arbitration panel sufficient contractual authority to hear such grievances. The Board is satisfied that there is ample jurisdiction in this respect. Article 14.01 of the Ontario collective agreement provides no restrictions on the hearing of policy grievances, and indeed, in article 14.01, grievances are described expansively as “any difference or dispute regarding the application or interpretation of this collective agreement”. In this respect, the arbitral case-law is clear that policy grievances will be limited only where there is specific language proscribing such matters. [*Weston Bakeries Ltd.*, (1970), 21 L.A.C. 308 (Weiler)] Accordingly, we find that the terms of the Ontario collective agreement empower an arbitration panel to hear policy grievances such as the grievance presently before the Board.

18. In the result, for reasons expressed above, we find that the grievance dated June 23, 1992 may be heard under the provisions of the Ontario collective agreement between the parties, and accordingly, that this Board has the jurisdiction to determine the issue raised in it.

19. Although the trade union took the position at the hearing that the Board lacked the contractual authority to deal with the present matter, it agreed that were we to find that we were possessed of jurisdiction, it would not contest the merits of the grievance. Indeed, the representative for the trade union conceded that the interpretation proposed by the Employer is correct. For this reason, it is unnecessary to review in detail the merits of that position. Accordingly, bearing in

mind the agreement of the parties, the Board finds that under the terms of the Declaration of Trust and the Pension Plan that forms part of the collective agreement between the parties, the Board of Trustees is not required to accept contributions to the Pension Fund on behalf of employees by employers that are not parties to a valid collective agreement.

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**3562-92-R International Association of Machinists and Aerospace Workers, Applicant v. Premark Canada Inc., Responding Party**

**Bargaining Unit - Combination of Bargaining Units - For many years, union representing unit of service technicians employed by employer in Toronto - Union newly certified to represent unit of employer's service technicians in and around Sudbury - Union applying to combine bargaining units - Evidence not supporting finding that combination would cause employer serious labour relations problems - Board satisfied that larger bargaining unit in this case making labour relations sense - Board combining the bargaining units and remaining seized with regard to further remedial relief**

**BEFORE:** *Janice Johnston*, Vice-Chair, and Board Members *D. G. Wozniak* and *E. G. Theobald*.

**APPEARANCES:** *James Hayes, Dave Ritchie, Dick Foster* and *Pat Murphy* for the applicant; *T. W. Sargeant, Paul George Stethem* and *Donald A. Knox* for the responding party.

**DECISION OF JANICE JOHNSTON, VICE-CHAIR AND BOARD MEMBER E. G. THEOBALD:**  
June 15, 1993

1. This is an application to combine bargaining units pursuant to section 7 of the *Labour Relations Act* (the "Act").
2. A hearing was held in this matter on April 28, 1993. The Board heard evidence from two witnesses. Mr. Dave Ritchie, a business agent for the International Association of Machinists and Aerospace Workers (the "Union") and Mr. Donald Knox, Central Canada Sales Manager for Premark Canada Inc. (the "Employer" or "Premark") gave evidence before the Board.
3. Section 7 of the Act reads as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

  1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
  2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.

3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

4. Premark manufactures, sells and services food preparation equipment, warewash and waste equipment and weight/wrap equipment. This equipment is utilized in commercial kitchens such as are found in restaurants and hospitals. Some examples of the equipment are meat slicers, weigh scales and certain refrigerated units.

5. Premark's main administrative offices and central warehouse are located at 190 Railside Road in North York. The company also has a central service branch located at 50 Mural Street in Richmond Hill. The union has been the bargaining agent for the employees working out of the Richmond Hill location for many years. The bargaining unit consists of approximately 20 individuals all of whom are employed as and classified as service technicians. The recognition clause of the current collective agreement in force between the parties is as follows:

#### ARTICLE 2 - RECOGNITION

- 2.01 The Company recognizes and accepts the Union as the sole collective bargaining agency for all its employees at 50 Mural Street, Richmond Hill, save and except Shop Managers, Field Service Supervisors, persons above the rank of Shop Manager or Field Service Supervisors and office and sales staff.
- 2.02 Agents, salesmen and out-of-town trainees who may be attached to the Company for training purposes shall not be used to displace regular employees in the bargaining unit, but shall be regarded as supernumerary and, as such, excluded from the application of this agreement.

6. The vast majority of the work of the service technicians involves the service, repair and maintenance of Premark equipment found in commercial kitchens. They also perform a minimal

amount of installation work. The duties of Mr. Ritchie include responsibility for this bargaining unit and he has been associated with it since 1978. Until four years ago he was responsible for collective bargaining with Premark on behalf of the union.

7. The Board (differently constituted) by decision dated April 5, 1993 certified the union for a bargaining unit consisting of:

all employees of Premark Canada Inc. at its PMI Food Equipment Group Canada Division in the Regional Municipality of Sudbury and the Counties of Algoma, Sudbury, Cochrane, Temiskaming, Nipissing, and Parry Sound, save and except shop managers, field service supervisors, persons above the rank of shop manager or field service supervisor and office and sales staff.

For ease of reference, this bargaining unit will be referred to as the northern bargaining unit and the bargaining unit operating out of the Richmond Hill location will be referred to as the southern bargaining unit. The northern unit is made up of three employees. One employee is located in Sault Ste. Marie, one in Sudbury and one in Cochrane. All three are classified as service technicians and perform duties identical to their counterparts in the southern bargaining unit. It is these two bargaining units which the union seeks to combine.

8. There are three Premark sales and service branches in Ontario. They are located in Hamilton, Ottawa and Toronto. The service technicians operating out of the Hamilton and Ottawa locations are not included in either of the bargaining units affected by this application.

9. Mr. Randy Taylor, a service manager for Premark, is responsible for the Toronto Branch located in Richmond Hill. In addition to the service technicians included in the southern bargaining unit, Mr. Taylor is also responsible for the service technicians located in the northern unit. He directs the work assignments of all the service employees including the three service technicians in the northern bargaining unit. The three individuals in the northern unit, as well as the employees in the southern unit, report to the Richmond Hill Office and receive their work assignments from a dispatcher in the Richmond Hill location. Employees are dispatched by two-way radio, pager or telephone. Employees primarily work out of their homes and vehicles. There has never been any intermingling of employees or movement of employees between the southern bargaining unit and the northern bargaining unit.

10. All the employees in the northern bargaining unit and the southern bargaining unit are paid by direct deposit which is administered by the payroll department at the Railside Road location. Benefits are also centrally administered from Railside Road. The three individuals employed in the northern bargaining unit are paid less than the employees in the southern bargaining unit with equivalent seniority. Employees in the southern bargaining unit with their seniority and skills currently receive the top hourly rate which is \$18.90 per hour plus a 75¢ per hour premium if they are licensed to work with equipment which utilizes gas. Therefore a technician in the southern bargaining unit with a gas licence receives \$19.65 an hour. Two of the three employees in northern bargaining unit currently receive \$18.25 per hour and the other is paid \$18.50 per hour. These rates include the 75¢ premium for a gas licence. The employees in the northern bargaining unit received their last increase in January 1993. The collective agreement covering the southern bargaining unit runs from August 11, 1992 to August 10, 1995. The employees receive wage increases in August in each of the three years of the agreement. The top hourly wage rate for service technicians in the southern bargaining unit will increase to \$19.52 on August 11, 1993. The employees in the northern bargaining unit do not receive the same benefits as the employees in the southern bargaining unit.

11. The reasons behind the union's decision to seek to organize the northern bargaining

unit and then make application to the Board to have it combined with the southern bargaining unit were outlined for the Board by Mr. Ritchie. Prior to the enactment of Bill 40 the union did not seek to obtain bargaining rights for the northern unit as it was not economically feasible to have such a small bargaining unit. The union would not normally consider such a small local due to the costs associated with the negotiation and administration of the collective agreement. Therefore although the union would not normally consider such a small bargaining unit, in this case because it felt it may be possible to combine the new northern bargaining unit with the southern bargaining unit, the union decided to organize the three employees located in northern Ontario. If the two bargaining units were not combined, the union also expressed concerns that consistency in the treatment of employees performing the work of a service technician might suffer if there were two separate locals with two separate collective agreements.

12. Mr. Knox on behalf of Premark expressed concern that the company might not be able to manage a profitable organization in northern Ontario if it was forced to compensate the service technicians at the same rate as is paid to the service technicians in its southern Ontario bargaining unit, as Premark cannot charge an equivalent service charge to its northern Ontario customers. Premark charges its customers for service calls on an hourly basis. The service charge rate in the Toronto area is \$75.00 per hour. The service charge rate is less in northern Ontario and is \$67.00 per hour. The northern Ontario rate is the highest rate the market can bear. Many independent service providers compete with Premark in northern Ontario, therefore to keep its customers, a lower rate must be charged. The service technicians in southern Ontario complete an average of 4.5 service calls per day. Due to the greater geographical distances between calls in northern Ontario the technicians can only complete an average of 2.5 calls per day. As the distances travelled in the north are greater, the travel costs are higher and the service vehicles must be replaced more frequently than the vehicles in southern Ontario. The operating costs for the vehicles in northern Ontario are approximately \$200.00 more per month than the cost for the vehicles in southern Ontario.

13. Mr. Knox admitted in cross-examination that the company's concern in this application was not that the bargaining units would bargain together but that it might not be possible to negotiate a different wage rate in the northern unit. Mr. Knox also expressed concerns with regard to the manner in which certain aspects of the southern Ontario collective agreement would apply in northern Ontario. Stand-by pay and the grievance procedure were examples cited to support this.

14. The employer and the union enjoy a good working relationship. Very few grievances are filed by the union and there appears to be a desire on the part of both sides to work out any problems together.

### Argument

15. Counsel on behalf of the union argued that the facts in this case present exactly the type of situation envisioned by the legislature as one in which the Board should find it appropriate to combine bargaining units pursuant to section 7 of Act. In his view, it makes collective bargaining sense to put the the small bargaining unit of three individuals who perform identical work into the larger unit. Counsel took the position that section 7 of the Act is directed to bargaining unit structure and requires the Board to look at and determine what is an acceptable bargaining unit.

16. On the facts of this case, counsel for the union suggested that section 7(2.1) applies as the union filed its application to combine bargaining units with the application for certification of the northern unit. Section 7(3) outlines the factors that the Board shall consider in making the decision whether or not to combine bargaining units.

17. Counsel for the union submitted that the evidence before the Board supported a finding that combining the bargaining unit would facilitate viable and stable collective bargaining and would reduce fragmentation of bargaining units. He argued there was no evidence before us that combining the bargaining units would cause serious labour relations problems. Counsel argued that the evidence supported the conclusion that the employer had business concerns that costs would be increased and its ability to function in northern Ontario would be impacted, but that those concerns are irrelevant unless they could be considered to establish serious labour relations problems. Counsel questioned whether the concerns of the employer could be considered to be serious labour relations problems. The application to combine bargaining units looks essentially at adding three individuals to the southern bargaining unit. Counsel queried whether the costs of simply rolling these employees into the unit and bringing their wages and benefits up to the level enjoyed by the other service technicians was sufficient to deter the Board from directing the combination of the bargaining units. In counsel's opinion, the concerns expressed by the company went to the result of combining the two bargaining units and did not go to the issue of collective bargaining structure. Counsel urged the Board to focus on the fact that the Act looks at facilitating the combination of bargaining units and to not confuse collective bargaining structure with the results that people seek to achieve through collective bargaining structure or process.

18. Counsel argued that the combination of the northern and southern bargaining units would result in a more stable collective bargaining structure. In this case the employees in both units performed identical work and report to the same manager in Toronto. If the Board does not combine the bargaining units, in counsel's view we would be doing what section 7 of the Act seeks to avoid.

19. Counsel for the union dismissed the concerns expressed by the employer with regard to issues such as the grievance procedure and standby pay as in his opinion they did not relate to the issue of appropriate bargaining unit structure. Counsel pointed out that simply because there may be difficulties in resolving the results of a combination order does not mean that the combination order should not be made.

20. Counsel on behalf of the employer expressed concerns that as the collective agreement covering the employees in the southern bargaining unit does not expire until 1995, if the Board was to simply roll the northern bargaining unit into the southern bargaining unit, the employer would lose its right to bargain with the employees in the northern bargaining unit. As the collective agreement is binding until 1995 the employer would not have an opportunity to bargain until three years hence. Counsel pointed out that the purpose of the Act is to enhance the process of collective bargaining in Ontario. If the northern bargaining unit is simply combined with the southern bargaining unit there would be no opportunity to negotiate and therefore the act of consolidation would not be in furtherance of the purposes of the Act. Counsel took the position that it is one thing to combine bargaining units where wages and benefits are the same but in this case they are not. Counsel for the employer argued that the Board should conclude that the combination of these two bargaining units could lead to serious labour relations problems and decline to issue an order combining them.

21. Counsel for the employer argued that there was no community of interest between the employees in the northern bargaining unit and those in the southern bargaining unit and pointed out that there was no interchange of employees between the two bargaining units. Counsel argues that having two bargaining units would not result in undue fragmentation. Counsel referred the Board to the *Mississauga Hospital* case [1991] OLRB Rep. Dec. 1380 at paragraph 22 where the Board points out that there are four underlying concerns to the issue of undue fragmentation. These concerns are: to avoid a multiplicity of bargaining units and consequent disruption for the

employer; to avoid restricting job opportunities in small bargaining units; to avoid jurisdictional disputes; and to avoid creating the administrative inconvenience to the employer which would result from having to deal with the number of bargaining agents and at different times. Counsel for the employer took the position that none of these concerns were present in the case before us.

22. Counsel on behalf of the employer submitted that in determining whether or not a bargaining unit was appropriate the Board has looked at whether or not the proposed unit of employees would be able to carry on a viable and meaningful collective bargaining relationship with the employer. Counsel pointed out that viable is defined in the dictionary as being practical from an economic perspective. Counsel argued that it would not be very practical if the Board combined the two units and allowed the employees in the northern bargaining unit to walk in and get the benefits of the existing collective agreement. If the Board directed the consolidation of the two units, counsel expressed concern that the employer would not have an opportunity to bargain with the union about its concerns. In his opinion, the Board should not insert itself into the bargaining process. In the course of his argument counsel referred the Board to the following cases: *Price Club Westminster*, [1992] OLRB Rep. Oct. 1098; *The Hostess Frito-Lay Co.*, [1992] OLRB Rep. July 809; *Union Carbide Canada Limited*, [1992] OLRB Rep. May 645; *Canadian National Railway Co. et al.* [1981] 34 O.R. (2d) 385; *Summner Press Ltd.*, [1991] OLRB Rep. Oct. 1207; and *The Corporation of the City of Timmins - Golden Manor Home for the Aged*, [1991] OLRB Rep. Jan. 103.

23. In response, counsel for the union took issue with the employer's emphasis on the duty or right to bargain. He disagreed with the assertion that the employees in the northern bargaining unit should not be able to get the benefit of the existing collective agreement. Counsel pointed out that the union would not have looked to organize the employees in northern Ontario if they did not feel that they would be able to combine this new unit with the existing one. He questioned how collective bargaining would be enhanced if the employees in northern Ontario did not have access to collective bargaining at all, which they would not have had if the union had not sought to represent them.

24. Counsel for the union pointed out that section 7 does not stipulate that the terms and conditions of employment have to be identical before bargaining units can be combined. If that was the case, then few applications to combine bargaining units would be successful. Counsel concluded his submissions by requesting that the Board combine the two bargaining units and enjoin the employees in the northern bargaining unit in the existing collective agreement.

#### *Decision*

25. This is an application to combine bargaining units filed pursuant to section 7(2.1) of the Act. The application to combine the bargaining units was submitted in conjunction with an application for certification for the northern bargaining unit. The parties were able to agree on all matters pertaining to the application for certification. A certificate was issued for the northern bargaining unit on April 5, 1993. Thus the application before the Board seeks to combine a newly certified bargaining unit for which the parties have not negotiated a collective agreement, with a bargaining unit which has been in existence for many years. As noted, the parties are bound to a collective agreement outlining the terms and conditions of employment for the southern bargaining unit which is to expire on August 11, 1995.

26. Section 7(3) of the Act outlines three factors that the Board shall consider in an application to combine bargaining units. Section 7(3) directs the Board to look at the extent to which combining bargaining units would facilitate viable and stable collective bargaining, would reduce fragmentation of bargaining units, or would cause serious labour relations problems. The parties

focused on these three factors. There was no dispute that section 7(4) of the Act did not apply, based on the facts in this case.

27. The factors set out in section 7(3) have long been utilized by the Board pursuant to the exercise of its discretion, contained in section 6(1) of the Act, to determine the unit of employees that is appropriate for collective bargaining in an application for certification. An adjudication on the issue of whether or not it is appropriate to combine bargaining units is in some ways similar to a hearing before the Board to determine the appropriateness of a bargaining unit description in an application for certification.

28. In assessing whether to combine the bargaining units the Board must determine whether to do so would facilitate viable and stable collective bargaining. The employer argues in this case that it would not. Counsel argued that there was no community of interest between the employees in the northern bargaining unit and those in the southern bargaining unit. Community of interest is one factor looked at by the Board in determining whether a particular bargaining unit configuration would facilitate viable and stable collective bargaining, or cause serious labour relations problems. In determining whether employees share a community of interest, the Board has traditionally looked at criteria such as whether the employees in issue possess similar skills and abilities, are employed under similar working conditions, and share common management. The Board also considers the nature of the work performed, the geographic circumstances and the functional coherence and interdependence. (See for example *Usarco Limited*, 1967] OLRB Rep. Sept. 526 and *Coca Cola Ltd.*, [1989] OLRB Rep. Jan. 1).

29. Based on the evidence before us, we must disagree with the employer's position that no community of interest exists. All the employees in both bargaining units are employed in the same classification, that of service technician, and perform identical duties. The employees in the northern bargaining unit report to Mr. Randy Taylor as do the employees in the southern bargaining unit. The work of both groups of employees is dispatched from the same southern Ontario location. The Board heard no evidence which would indicate that the employees in both units do not share many of the same collective bargaining interests and do not possess similar skills and training (in fact it seems likely that the reverse is true given that they perform identical work). Although the two units are geographically disparate that is due to the nature of the work. The employees in both bargaining units work on their own, operating primarily out of a vehicle. Thus, the "work-place" of service technicians is constantly changing. We heard no evidence that the employees in the southern bargaining unit are functionally interdependent and given the nature of their work it seems unlikely that they would be. The three individuals in the northern bargaining unit obviously work quite independently as well. While there is no doubt that the three individuals in northern Ontario cover more ground than their southern counterparts, the nature of the work is the same. On the facts of this case, we are not dealing with two distinct operations which are geographically separated, but one operation which is spread out over a large area. Therefore, even though work is performed over a very large geographic area this does not detract from the community of interest shared by the service technicians in both units. Although there does not appear to have been an interchange of employees between the two bargaining units, the distances involved could have influenced this decision by the employer. For all of these reasons, it appears to us that the employees in the northern bargaining unit do share a community of interest with the employees in the southern bargaining unit.

30. Before making the decision to combine bargaining units the Board must consider the effect what such an order would have on the employer and the union. If we were to conclude that combining bargaining units would not facilitate viable and stable collective bargaining, or would cause the reverse, the Board has the discretion to refuse to issue the combination order. The

employer in this case has raised concerns with regard to the possible effects of a consolidation order. It appears to us that these concerns are to a large extent predicated on the assumption that if the Board combines the bargaining units, the three employees in the northern bargaining unit will automatically be covered by the collective agreement in force between the parties. This is not true. If the two bargaining units are combined there can only be one collective agreement. However, it does not have to be the collective agreement currently in existence. That is one option, but there are other options as well. The parties should not assume that when the Board concludes that it is appropriate to consolidate a new bargaining unit with a long-time bargaining unit, that the employer will be directed to provide all of the existing terms and conditions of employment, which are the result of many years of negotiations, to the employees in the newly certified bargaining unit.

31. The employer in this case is concerned in essence that it will not have an opportunity to bargain collectively with the employees in the northern bargaining unit if they are rolled into the southern bargaining unit and that the employees in the northern bargaining unit will automatically receive the benefits of the long term relationship between the employer and the union as reflected in the collective agreement between the parties. Both of these concerns are valid concerns. However, it appears to us that they are not sufficient to establish that a consolidation order would not facilitate viable and stable collective bargaining. For the reasons already set out we conclude that in the circumstances of this case, combining the two bargaining units would facilitate viable and stable collective bargaining.

32. The employer has taken the position that fragmentation is not an issue in this case. While we agree that fragmentation is not at issue in the same sense as it was in cases such as *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481 and *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, nevertheless the statute requires us to consider whether in combining bargaining units, fragmentation will be reduced. Although the northern bargaining unit is an appropriate bargaining unit, it appears to us that the larger bargaining unit makes more labour relations sense. If two separate bargaining units are retained, the union's concerns with regard to consistency in the terms and conditions of employment of individuals performing the same work could be borne out. In addition, clearly the job opportunities of the three individuals in the northern bargaining unit would be restricted and there could be a potential for jurisdictional disputes. If the two bargaining units are combined it will obviously reduce fragmentation.

33. The final factor to be considered by the Board in this case is whether combining the two units would cause serious labour relations problems. The employer has expressed concerns that combining the bargaining units would do so. Once again it appears to us that the concerns expressed by the employer relate more to the apprehension that it will not have an opportunity to bargain with the employees in the northern bargaining unit if the Board issues a combination order. Clearly the legislation provides that the Board is to consider whether combining bargaining units would cause serious labour relations problems and if we conclude that a combination order would do so, we may decline to combine the bargaining units. The serious labour relations problems referred to in section 7(3)(c) must flow from the act of consolidation and must be considered by the Board before it concludes that it is appropriate to issue an order combining bargaining units. In the case before us the employer's concerns flow from the assumption that the Board will direct that the employees in the new combined bargaining unit will receive all of the rights enjoyed by the employees currently in the southern bargaining unit who are covered by the collective agreement. While the change in bargaining unit structure which results from a combination of bargaining units could cause serious labour relations problems which would cause the Board to conclude that a consolidation order is not appropriate, the evidence before us in this case does not support such a finding.

34. The union in this case seeks a consolidation order. It also seeks a direction from the Board that the three individuals in the northern bargaining unit are to be rolled into the southern bargaining unit and that their employment will henceforth be governed by the terms and conditions of the collective agreement in existence covering employees in the southern bargaining unit.

35. After having carefully reviewed the evidence before us and the submissions of the parties, we conclude that it is appropriate to consolidate the two bargaining units in this case. Therefore, the Board declares that the two bargaining units in issue here are combined.

36. We decline to order that the collective agreement in existence between the parties will automatically apply to the employees formerly in the northern bargaining unit. Although section 7(5) gives the Board the authority to “amend any provision of a collective agreement” or to “make such other orders as it considers appropriate in the circumstances” we do not feel that it is appropriate to make any further remedial orders at this point. The employer has expressed concerns with the Board inserting itself into the collective bargaining process and the resultant loss on the part of the employer and the union of the opportunity to bargain the terms and conditions of employment for the employees formerly in the northern bargaining unit. We too have concerns and feel that it is appropriate to provide the parties with an opportunity to resolve the results of the Board’s consolidation order without further Board involvement. We therefore refer this matter back to the parties to provide them with the opportunity to resolve if possible, the manner in which the three employees from the northern bargaining unit are to be dealt with under the new bargaining unit structure. We will remain seized with regard to any further remedial relief.

#### **DECISION OF BOARD MEMBER D. G. WOZNAK:**

1. I dissent.

2. A consolidation order should only be issued where it would facilitate viable and stable collective bargaining and would not cause serious labour relations problems. The northern bargaining unit employees do not share a community of interest with the employees in the southern bargaining unit. The wages and benefits paid reflect the different contexts of each unit. This lack of a sufficient community of interest will give rise to a constant source of serious labour relations problems both in the present and the future.

3. It is one thing to say that the parties can bargain about any potential problems arising from the consolidation order, and if unsuccessful are able to return to the Board for assistance and direction in resolving any outstanding issues. However, that is not the case for any subsequent negotiations where the Board is not an available forum for disagreements. Given the continued lack of a sufficient community of interest, ongoing serious labour relations problems will ensue.

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**0333-93-R; 0334-93-R** International Union of Operating Engineers, Local 793, Applicant v. **Reclamation Management Canada Ltd.**, Responding Party; International Union of Operating Engineers, Local 793, Applicant v. Cal-Nevada Iron and Metals Corp., Responding Party

**Certification - Constitutional Law - Employers engaged in decommissioning uranium mine - Whether employers' labour relations within federal or provincial jurisdiction - Mines not operating, employers' activities not involving production, refining or treatment of prescribed substance within meaning of *Atomic Energy Control Act (A.E.C.A.)*, and employers' activities not otherwise "works or undertakings" within *A.E.C.A.* - Board satisfied that employers' labour relations falling within provincial jurisdiction - Certificates granted**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *P. V. Grasso*.

**APPEARANCES:** *Jack J. Slaughter*, *Michael Quinn* and *George Palanuk* for the applicant; *David Cameletti*, *Jerry Ross* and *John Little* for the responding party.

**DECISION OF THE BOARD;** June 8, 1993

1. These two applications for certification came on for hearing together on May 31, 1993. Both responding employers opposed the respective applications on the basis that their operations are within federal jurisdiction and governed by the Canada Labour Code, and that the labour relations of the responding employers are therefore not within this Board's jurisdiction.

2. The parties agreed to the facts which they considered material to the jurisdiction issue as follows:

- (a) in Board File No. 0333-93-R (Reclamation of Canada Ltd. ("Reclamation")):

#### AGREED STATEMENT OF FACTS

1. The Responding Party is engaged in the business of decommissioning mines and industrial facilities particularly where environmental concerns play a major factor.
2. The Responding Party holds a contract with Rio Algom Ltd. to decommission three uranium mines sites in Elliot Lake, Ontario. The Responding Party is the managing contractor responsible for all activities required to collect and store hazardous and toxic materials, asbestos containment and removal, dismantling and cleanup, asset removal, sales and site restoration. In doing so the Responding Party is required to observe the provisions and regulations of the Atomic Energy Control Act of Canada.
3. In order to execute the Responding Party's responsibilities it subcontracted parts of the work as follows:
  - (i) asbestos containment and removal to Continental Insulation;
  - (ii) asset removal, dismantling and cleanup to Cal-Nevada Iron & Metals;
  - (iii) hazardous material removal and disposal to Laidlaw Environmental.
4. The balance of the work is performed by the Responding Party directly. Work activities are:

Hazardous Material Collection: including acid generating materials, chemicals, hydrocarbons, P.C.B.'s, radio active contaminated material;

Sales - Used Assets: Ball mills (used to grind uranium ore), crushers, pumps, electrical components;

Warehousing - Storage and shipment of sold assets;

Removal of Asbestos Covered Pipe to landfill: including containing, transporting and burying asbestos;

5. The scheduling of work activities is regulated by the federal Atomic Energy Board, the provincial Ministry of Labour and the provincial Ministry of the Environment. Hazardous material collection and asbestos containment must be completed before any dismantling activities can be done.
6. The Responding Party has hired employees to perform the activities which it must perform at the three uranium mines at Elliot Lake. These employees make up the bargaining unit for which the Applicant seeks to be certified.

All of which is agreed by the parties hereto.

- (b) in Board File No., 0334-93-R (Cal-Nevada Iron & Metals Corp. ("Cal-Nevada")):

#### AGREED STATEMENT OF FACTS

1. The Responding Party is a subcontractor engaged by Reclamation Management Canada Ltd., a general contractor, pursuant to a contractual relationship with Rio Algom Ltd. which is more fully described in Paragraph 2 of the Agreed Statement of Facts of Board File No. 0333-93-R.

2. In carrying out their subcontracted responsibilities for the general contractor under the aforesaid contractual relationship, the Responding Party is required to observe the provisions and regulations of the *Atomic Energy Control Act of Canada*.

3. The subcontracted work performed by the Responding Party can generally be described as the taking down, cleanup, and restoration of the areas of three uranium mine sites in Elliot Lake, Ontario.

4. The work specifically involves:

- a) the careful and safe taking down and dismantling of all above-ground structures on the three sites;
- b) opening up of pipe tunnels, conveyor ways, and underground basement and then subsequently backfilling these to complete grade restoration;
- c) taking down of any upstanding structure above 1 foot below finished grade level;
- d) the final general grading and ripping of all site areas to match the adjacent natural contours and which will encourage natural vegetation;
- e) the removal and cleaning of probable assets for future or present disposal;
- f) the safe and approved disposal of material, equipment, and debris which cannot be readily sold, arising from this work at a specified location identified by Rio Algom Ltd.

5. The above work is to be completed between 1992 and 1994.

6. The scheduling of work activities is regulated by the Federal Atomic Energy Board, the Provincial Ministry of Labour, and the Provincial Ministry of the Environment.

7. The Responding Party has hired employees to perform the subcontracted activities which it

must perform at the three uranium mines at Elliot Lake, Ontario. These employees make up the bargaining unit for which the Applicant seeks to be certified.

All of which is agreed by the parties hereto.

3. Counsel for Reclamation submitted that the work of decommissioning a uranium mine is under federal jurisdiction because it is an integral part of or necessarily incidental to the mining of uranium for use in the production of atomic energy. Counsel referred to section 18 of the *Atomic Energy Control Act* and argued that closing a mine is an integral part of operating it, and that it is therefore part of the undertaking as a whole. Counsel for Cal-Nevada adopted the representations of counsel for Reclamation and also argued, in the alternative, that the work of the responding employers is within federal jurisdiction because it is work physically on or in connection with a federal undertaking and therefor comes within section 4 of the Canada Labour Code. In that respect, counsel submitted that the work in question is like construction work. In support of their position, the responding employers referred the Board to *Vis-U-Ray*, [1971] OLRB Rep. Nov. 703; *Manitou Mechanical Ltd.*, [1978] OLRB Rep. July 657; *Reliable Window Cleaners (Sudbury) Limited*, [1982] OLRB Rep. Nov. 1714; *Robertson-Yates Corporation Limited*, [1962] OLRB Rep. Oct. 215; *Industrial Construction Division Allied Structural Steel Company*, [1973] OLRB Rep. Dec. 636; *Cant v. Canadian Bechtel Ltd.* (1957) 12 D.L.R. (2d) 215 (County Court, B.C.); *Chamberlin v. The King*, (1909) 62 Can. S.C.R. 350 (Supreme Court of Canada).

4. The applicant conceded that the “operation” of a uranium mine is within federal jurisdiction and under the Canada Labour Code. However, it submitted that neither responding employer is engaged in operating the mines in question and that legislation like the *Atomic Energy Control Act* must be given a purposive interpretation. The applicant submitted that the mere fact that the work is “on” what was a federal undertaking, or that there is federal regulatory legislation which applies, does not put the responding employers’ operations within federal jurisdiction. The applicant referred the Board to *Northern Telecom Limited v. Communications Workers of Canada et. al.*, (1979) 98 D.L.R. (3d) 1; 79 CLLC ¶15,256 (Supreme Court of Canada); *Construction Montcalm v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; 79 CLLC ¶14,190; *Bachmeier Diamond and Percussion Drilling Co. Ltd. and Beaverlodge District of Mine, Mill and Smelter Workers Local Union No. 913*, (1962) 35 D.L.R. 241; 63 CLLC ¶15,435 (Saskatchewan Court of Appeal); *Peter Kiewit Sons Co. Ltd.*, [1988] OLRB Rep. May 510.

5. Section 91 of the *Constitution Act (1867)* R.S.C 1985, App. II provides, in part, that:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, - ...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

(often referred to as the “peace, order, and good government” or “p.o.g.g.” clause). Further, section 92 of the *Constitution Act*, 1867 provides that:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-

10. Local Works and Undertakings other than such as are of the following classes:-

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

6. In section 2 of the *Atomic Energy Control Act*, R.S.C. 1985, c. A-16, “atomic energy” and “prescribed substances” are defined as follows:

“atomic energy” means all energy of whatever type derived from or created by the transmutation of atoms;

“prescribed substances” means uranium thorium, plutonium, neptunium, deuterium, their respective derivatives and compounds and such other substances as the Board may by regulation designate as being capable of releasing atomic energy or as being requisite for the production, use or application of atomic energy;

Section 18 of that Act provides that:

18. All works and undertakings constructed

(a) for the production, use and application of atomic energy,

(b) for research or investigation with respect to atomic energy, and

(c) for the production, refining or treatment of prescribed substances,

are, and each of them is declared to be, works or a work for the general advantage of Canada.

7. Sections 2 (h) and 4 of the Canada Labour Code provide that:

2. (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces, ...

4. This Part applies in respect of employees who are employed on or in connection with the operation of federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions employers' organizations composed of those employees or employers. R.S., c. L-1, s. 108; 1972, c. 18,s.1.

8. It is readily apparent that the Parliament of Canada does not have a general jurisdiction over labour relations. On the contrary, employment matters, including labour relations, are *prima facie* within provincial jurisdiction, as a matter of property and civil rights, and that federal jurisdiction is the exception rather than the rule. (Indeed, even an unemployment insurance commission scheme was found to be *ultra-vires* the federal parliament in *Unemployment Insurance Preference* [1937] A.C. 355 and had to be overcome by an amendment to the *Constitution Act* which added “unemployment insurance” as a new head of federal power.) Labour relations matters come within federal jurisdiction only if it is demonstrated that they are an integral part of a federal work, business or undertaking, or of a “local work or undertaking” excluded from provincial jurisdiction under section 92 (10) of the *Constitution Act*, 1867 (see, for example, *Toronto Electric Commission v. Snider* [1925] D.L.R. 5; [1925] A.C. 396 (J.C.P.C.); *Northern Electric Company Limited* 63 CLLC ¶15,484; *General Enterprises Ltd.* [1977] 1 CLRB Reports 432; *Construction Montcalm v. Minimum Wage Commission*, *supra*; *Northern Telecom Ltd. v. Communications Workers of Canada et al.*, *supra*; *Four B Manufacturing v. United Garment Workers*,

[1980] 1 S.C.R. 1031; *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272, application for; judicial review dismissed, (1981) 30 O.R. (2d) 732 (Ont. Div. Court), leave to appeal denied by Ontario Court of Appeal September 15, 1980, unreported; *W. Rourke Ltd.*, [1983] OLRB Rep. Oct. 1711). Both the courts and labour relations tribunals (including this Board) have applied a functional test in determining whether the labour relations in issue in a particular case are within federal jurisdiction. That is, the question to be answered is: does the work in which the employees in question are engaged form an integral part of, or is it necessarily incidental to, a federal work, undertaking or business as a going concern?

9. The fact that the employer or activity in question is subject to some form of federal regulation may be relevant but will not be determinative of a jurisdiction issue. Of far greater significance is the existence of a functional or operational connection between the activity and an undertaking which is within federal jurisdiction. For example, employees engaged in constructing airport runways are not swept into federal jurisdiction if their work is simply construction and is unrelated to the design or operation of an airport which would be an integral part of aeronautics (*Construction Montcalm v. Minimum Wage Commission*, *supra*); the employees of a company operated by "Indians" on "Lands reserved for the Indians" (section 91(24) of the *Constitution Act, 1867*) who are engaged in manufacturing shoes are not in federal jurisdiction (*Four B Manufacturing v. United Garment Workers*, *supra*), and employees of a hotel owned by but functionally separate from a inter-provincial railway will not be within federal jurisdiction (*C.P.R. v. A-G B.C. (Empress Hotel)*, [1950] A.C. 122). (See also, *Bachmeier Diamond and Percussion Drillings Co. Ltd. v. Beaverlodge District of Mine, Mill Workers Local Union No. 913*, *supra*; *Northern Telecom Ltd. v. Communications Workers of Canada et al*, *supra*; *Re Henuset Rentals Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488*, 78 CLLC ¶16,137 (Saskatchewan Labour Relations Board), affirmed 96 D.L.R. (3d) 651, 79 CLLC ¶14,194, [1979] 2 W.W.R. 727 (Saskatchewan Queen's Bench), affirmed 119 D.L.R. (3d) 639, [1981] 1 W.W.R. 748 (Saskatchewan Court of Appeal); *Manitou Mechanical Ltd.*, *supra*; *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. Canadian Pacific Limited and Marathon Realty Company Limited*, [1978] 1 CLR Reps. 493; *Wakeham and Son Ltd.*, [1981] OLRB Rep. July 1036; *Re Burnshire Mobile Maintenance Ltd. and Canada Labour Relations Board*, (1985) 22 D.L.R. (4th), 748 (Federal Court of Appeal); *National Protective Guard Service Company Limited*, [1987] OLRB Rep. Feb. 245; *Blue Water Bridge Duty Free Shop Inc.*, [1988] OLRB Rep. Feb. 109; *Vibration Assessment Ltd.*, [1989] OLRB Rep. Feb. 223.)

10. In this case, the activities of the responding employers in decommissioning the Rio Algom uranium mines in Elliot Lake are regulated by both federal and provincial legislation. The "decommissioning" of the mines is analogous to demolition work in the construction industry. Just as construction of something (like an airport) which is to be used in operating a federal undertaking is not necessarily itself within federal jurisdiction, neither is its decommissioning or demolition. It is clear that none of the mines are operating and that none of the responding employers' activities involve the production, refining or treatment of a prescribed substance within the meaning of section 18 of the *Atomic Energy Control Act*, or that any of the activities are otherwise "works or undertakings" under that provision. In short, the employees or the responding employers are not engaged in work which is an integral part of or necessarily incidental to a federal work, undertaking or business as a going concern. The Board is therefore satisfied that the labour relations of these responding employers fall within provincial jurisdiction and that these application are within the Board's jurisdiction.

11. The parties have reached agreement with respect to all other matters necessary to the

disposition of these two applications. The Board is satisfied that it is appropriate to dispose of the applications on that basis.

12. Accordingly, in Board File No. 0333-93-R:

- (a) the Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*;
- (b) the Board finds that all employees of Reclamation Management Canada Ltd., in the City of Elliot Lake, save and except project foremen, persons above the rank of project foreman, office, clerical and technical staff, constitute a unit of employees appropriate for collective bargaining;
- (c) the Board is satisfied, on the basis of the evidence before it, that more than fifty-five percent of the employees of the responding employer in the bargaining unit, at the time the application was made, were members of the applicant on April 29, 1993, the date on which this application was made and the date on which membership was ascertained under section 8(1) of the Act.

A certificate will therefore issue to the applicant in Board File No. 0333-93-R.

13. In Board File No. 0334-93-R:

- (a) the Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*;
- (b) the Board finds that all employees of Cal-Nevada Iron & Metals Corp., in the City of Elliot Lake, save and except project foremen, persons above the rank of project foreman, office, clerical and technical staff, constitute a unit of employees appropriate for collective bargaining;
- (c) the Board is satisfied, on the basis of the evidence before it, that more than fifty-five percent of the employees of the responding employer in the bargaining unit, at the time the application was made, were members of the applicant on April 29, 1993, the date on which the application was made and the date on which membership is ascertained under section 8(1) of the Act.

A certificate will therefore issue to the applicant in Board File No. 0334-93-R.

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**1431-92-U Steven Sheppard, Applicant v. Brian Christie, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, Responding Parties**

**Construction Industry - Duty of Fair Referral - Parties - Practice and Procedure - Unfair Labour Practice - Business manager neither a necessary nor a proper party - Board granting respondent's motion to dismiss application as against union's business manager - Union's business representative and business manager referring out-of-work members on basis of their subjective and personal opinions of members' qualifications, abilities and interests - Union found to have contravened its own hiring hall working rules and section 70 of the *Act* - Complaint allowed and compensation ordered**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair.

**APPEARANCES:** *Gail Crossman* for the applicant on September 24, 1992, *Gail Crossman* and *Edward Spong* for the applicant on January 12, 1993, *Edward Spong* for the applicant on January 13 and 14, 1993; *A. J. Ahee* and *B. Christie* for the responding parties.

**DECISION OF THE BOARD;** June 22, 1993

**I Introduction**

1. The name of the responding party "U.A. Local 463" is amended to "United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463".

2. This is an application, under section 91 of the *Labour Relations Act*, in which the applicant complains that Brian Christie and the responding trade union ("Local 463") treated him in a manner contrary to sections 69 and 70 of the *Labour Relations Act*.

3. The applicant complains that Local 463 improperly referred other members instead of him to employment with Harold R. Stark Division of William Stark Group Inc. ("Stark") at a construction job site on the Canadian Armed Forces base at Trenton; that is, that Local 463 referred members who were below the applicant on its welders out-of-work list to this employment without first offering it to him, contrary to the working rules of the hiring hall in that respect and the provisions of the *Labour Relations Act*. The applicant claims damages for lost wages and benefits, including unemployment insurance benefits.

**II Preliminary Matters**

4. Several preliminary matters had to be disposed of before the hearing proceeded on the merits of the application.

5. First, the responding parties moved that Brian Christie be removed as a party or, in the alternative, that the application should be dismissed as against him. The applicant opposed this motion. Counsel argued that section 103 of the constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada imposed the duty of care on Christie, Local 463's Business Manager at all material times, akin to a fiduciary duty to the applicant, and further, that Christie in any event owed a common-law duty of care to the applicant. Counsel also referred to section 5 of the *Statutory Powers Procedure Act*, section 91(4) of the *Labour Relations Act* and section 79 of the Board's then Rules of Procedure (since

amended effective January 1, 1993) in support of her submissions that Christie was a proper responding party and should not be either removed or have the application against him dismissed without a hearing on the merits.

6. As pleaded, the applicant alleged breaches of section 69 and 70 of the Act. These sections provide that:

**69.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

**70.** Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

Section 103 of the constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada provides that:

**SEC. 103.** The Business Agent and/or Business Manager meets in daily contact with the public and with employers, becoming the trustee of the welfare of the members of the Local Union. It is his solemn duty and obligation to vigilantly protect the trade jurisdiction of the United Association in the plumbing and pipe fitting industry of his locality; also to compel employers to observe and respect collective bargaining agreements, adjusting all grievances between members of his Local Union and their employers with justice and fairness, as well as fostering and promoting employment for the members of the Local Union.

Section 5 of the *Statutory Powers Procedure Act* provides that:

Section 5

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings. 1971,c.47,s.5.

Section 91(4) of the *Labour Relations Act* provides:

**91.-(4)** Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned; with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employ-

ers' organization, trade union, council of trade unions, employee or other person jointly or severally; or

- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

Section 79 of the Board's then Rules of Procedure provided that:

79. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

7. In essence, section 69 of the *Labour Relations Act* imposes on a trade union a duty to fairly represent, in employment related matters, employees for whom it is the bargaining agent (that is, a duty of fair representation). Section 70 requires a trade union which is involved in the placement of persons in employment to act fairly in that respect (that is, a duty of fair referral). The primary application of the duty of fair referral is to the administration by a trade union of what is commonly referred to as a "hiring hall" in the construction industry. In short, it is an unfair labour practice for a trade union to act in a manner which is arbitrary, discriminatory or in bad faith in the representation in employment matters or referral to employment of persons it represents.

8. Like a corporation, a trade union acts through its officers and representatives, but it is the trade union which holds collective bargaining representation and administration rights and obligations, not its individual officers or representatives. Consequently, it is well settled that it is the trade union, not its officers or representatives, to which sections 69 and 70 apply, although the trade union is bound by and responsible for the acts or omissions of its officers and representatives. In this case, Christie could not himself be found in breach of either section 69 or section 70. It is Local 463, not Christie, which owes the duties of fair representation and fair referral to the applicant.

9. Further, section 5 of the *Statutory Powers Procedure Act* does not give a party the right to name whoever else it wishes as a party to a proceeding. If a person's presence as a party is not necessary to the proper adjudication of the dispute, or that person's rights, obligations or interests will not be affected by the proceeding, s/he is neither a necessary nor a proper party and can neither be required nor is entitled to be a party to the proceeding. Potential witnesses, whether actors in the material events or not, are neither necessary nor proper parties, regardless of how important their evidence might be, unless they also have a legal interest in the proceeding.

10. Section 91 of the *Labour Relations Act* in general, and section 91(4) in particular, provides a mechanism for bringing an alleged breach of the Act before the Board, and for obtaining relief with respect thereto. It is a procedural provision, not a substantive one. Similarly, section 79 of the Board's (then) Rules of Procedure did no more than specify a power which the Board enjoyed in any event; that is, to add any person as a party to a proceeding as the Board considers advisable.

11. Further, the Board is a statutory tribunal. As such the Board has only such jurisdiction or powers as have been conferred upon it by or under the *Labour Relations Act* or other legislation (see, for example, *The Colleges Collective Bargaining Act*, *The Hospital Labour Disputes Arbitration Act*, *The Occupational Health and Safety Act*). This complaint concerns the responding trade union's duties and obligations under sections 69 and 70 of the *Labour Relations Act* and the Board's jurisdiction is limited to considering whether the responding trade union has breached either of those sections as alleged by the applicant. While evidence of Christie's duties, responsibil-

ities and conduct as a representative of Local 463 in that respect may well constitute relevant evidence, neither his duties under the United Association's constitution, nor any common-law duty, as such, can constitute the basis of the Board's jurisdiction. The Board's jurisdiction in this matter is rooted in the *Labour Relations Act*, not in the trade union's constitution or the common law. While Christie's and Local 463's duties under the constitution or the common law may be relevant to the Board's consideration of the complaint that sections 69 and 70 have been breached, the forum for litigating a claim rooted in the constitution or the common law is other than the Board.

12. In the result, I was not satisfied that Christie was either a necessary or a proper party to this proceeding and I therefore dismissed the application as against Christie in an oral ruling given at the hearing.

13. Second, Stark was identified by Local 463 as an entity which might be affected by this complaint. The applicant did not seek to have Stark made a party. Nor did he seek any relief which might affect Stark. Accordingly, I saw no reason to make Stark (which is not represented at the hearing) a party to the complaint.

14. Third, Local 463 asked that this application be dismissed on the basis that it failed to disclose a *prima facie* case. The applicant conceded that section 69 of the Act does not apply. I therefore dismissed the application to the extent that it alleged a breach of section 69. However I was satisfied that a *prima facie* case for a breach of section 70 had been pleaded and I ruled that the application should proceed.

15. Fourth, Local 463 asserted that the applicant's allegations lacked particularity. However, Local 463 agreed to proceed with the hearing subject to its right to make objections or seek adjournments as it considered appropriate, at which time the Board would deal with this specific objection or request on its merits. As the hearing unfolded, it became necessary to adjourn the hearing to accommodate the production of documents by Local 463 and of further particulars by the applicant. In that respect, Local 463 was to produce documents to the applicant's counsel who was to keep possession and control of them. Further, I found it appropriate to direct that any documents or information exchanged between the parties or their counsel not be used for purposes unrelated to this proceeding.

### III The Merits

16. Local 463 operates a hiring hall, common in the construction industry, for the purpose of referring out-of-work members to employment. The hiring hall responds to requests for employees by employers bound by the provincial collective agreement between The Mechanical Contractors' Association Ontario, and The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. A contractor bound to that collective agreement which requires employees is obliged to contact the hiring hall and specify the number and kind of employees it requires. In that respect, Local 463 maintains four separate out-of-work lists: one for journeymen plumbers, one for journeymen steamfitters (for purposes of the *Labour Relations Act* the term "steamfitter" and "pipefitter" are synonymous - *D.E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228), one for welders, and one for apprentices. An out-of-work member's name can appear on only one out-of-work list at a time, which the member can select subject to having the appropriate qualifications. As one would expect, members are referred to employment by Local 463 according to their position on the relevant out-of-work list. Members' names appear on an out-of-work list in reverse order to the number of days they have been out of work. That is, the name of the member who has accumulated the greatest number of out-of-work days pursuant to the working rules appears at the top of the out-of-work list s/he is on and that member is supposed to be referred to

employment first. Members of Local 463 can only obtain employment through the hiring hall. They are not permitted to solicit work for themselves or to work outside of the union's jurisdiction.

17. The working rules which govern the operation of this hiring hall provide as follows:

U.A. LOCAL 463  
 "THE LAKESHORE LOCAL"  
 26 Caristrap Street, Unit #3  
 Bowmanville, Ontario, L1C 3Y7  
 (416) 623-1666

WORKING RULES  
 AMENDED JANUARY 26, 1977 AT REGULAR MEETING

- 1) A member who becomes unemployed must report to the Union Office, and his name will be placed on the Out of Work List, under one classification of his choice, if government qualified. (A member with two or more classifications must decide which list he wishes to be placed upon, and member must also sign book.)
- 2) For each working day he is upon the list, he will be credited with one day.
- 3) When a job becomes available in the area, the man with the most number of days to his credit in the classification required, will be called for the job.
- 4) A member turning down two jobs will lose twenty-five credit days, on each refusal after the first one, until he accepts a job.
- 5) A member fired for a justifiable reason will lose all his credit days.
- 6) When a member is called for a job and is not home, providing the message is given to a responsible person, and member does not return the call, this will be classified as a refusal.
- 7) A member who returns to Local 463 to work, for each day he works, one day will be deducted from the number of days he has accumulated. (This would eventually work out the list and would also prevent a man who has been working for a year in the area, from being on top of the list when he is again laid off.)
- 8) A member who becomes ill while unemployed will still be classed as unemployed.
- 9) In the case of a lock-out or strike, although a member has a job to return to at the termination of the lock-out or strike, he shall be classed as unemployed and may be referred to other employment providing he qualifies and there are no other members available.
- 10) In order to change or amend the working rules, it will be necessary to have a called meeting, and shall require a two-third majority. Except when notice of motion has been given at a previous meeting, then majority vote will rule.
- 11) A member on a temporary lay-off will be allowed to return to his former employment providing the lay-off is no longer than ten consecutive standard working days. A member on a temporary lay-off will not accumulate credit days, but will be eligible for SUB, provided he qualifies.
- 12) A foreman list will be maintained. When a company requires a Foreman, the man out of work with the greatest number of days will be called, with no penalty for refusing.
- 13) A member on Travel Card will have the option to freeze his days, and will not be called for work or accumulate days until he returns to his home Local, at which time his days will be re-activated.

These working rules have been established by Local 463's membership. Any changes to them must be approved by a vote of the members. In that respect, the membership has approved an exception to the working rules such that members whose unemployment insurance benefits are running out can be referred to short-term employment without regard to their position on the applicable out-of-work list.

18. The hiring hall, the working rules and the out-of-work lists are maintained and administered by Local 463's Business Manager and its Business Representatives.

19. In the case of the welders' out-of-work list, members must generally pass a welding test which pertains to the job for which an employer has requested workers. They are offered the opportunity to test for a job according to their position on the welders' out-of-work list. These welding tests are conducted at the hiring hall (except for Ontario Hydro which has its own testing facilities) by an Ontario Government inspector under the *Boilers and Pressure Vessels Act* R.S.O. 1990, Chpt. B.9. If the member passes the test, the inspector issues a time-limited certificate, commonly called a "ticket", to him/her and the member is referred by Local 463 to employment to fill the employer's request.

20. The applicant is a journeyman steamfitter. He has been a member of Local 463 since January 1, 1983. He was a member in good standing at all material times and, as such, was eligible for all the benefits of membership, including referrals to work.

21. Local 463 concedes that its hiring hall working rules were not followed for the Stark job in Trenton. More specifically, Local 463 concedes that the applicant was not offered employment or the opportunity to test for employment on that job, and that two members whose names appeared after the applicant's on the welders' out-of-work list were referred to employment with Stark on that job without the referral to such employment or the opportunity to test for it first being offered to the applicant.

22. Local 463 asserts that it was justified in departing from the working rules because the Trenton job presented a special situation. What made the Trenton job different or special, says Local 463, is that it required welders who could weld using the "downhand" technique. Previously, a non-union contractor had been the successful bidder for the same kind of work on the same job site. During the bidding process for the contract for the second phase of that work, Local 463 discovered that the earlier work had been performed using the downhand welding technique. This welding technique is generally considered to be faster than the "uphand" technique traditionally used on this kind of job. The evidence also reveals that there is a sense, which is not shared by everyone in the industry, that the downhand welding technique is also more difficult to master than the uphand technique. Brian Christie, Local 463's Business Manager, immediately advised union contractors which were interested in the job that they could bid it on the basis that the welding work would be performed using the downhand technique. On the evidence, this significantly reduced the bid submitted by Stark, a union contractor bound by the collective agreement referred to in paragraph 16 above. In the result, Stark's bid was the lowest and it was awarded the job. Not only would Stark not have been the lowest bidder if it had not bid the job downhand, but the contract would have been awarded to a non-union contractor.

23. In responding to Stark's subsequent request for welders, Christie and Larry Cann (Local 463's Business Representative and Training Co-ordinator) unilaterally decided not to apply the working rules for the Trenton job. Instead, they decided to refer out-of-work members who they felt could perform the work well, on the basis of their personal knowledge of the member's abilities, their sense of which members had shown an interest in downhand welding, either by taking the downhand course which Local 463 had offered at its hiring hall or otherwise, and the out-

of-work list, without going through the names on the welders' out-of-work list in order. They did not contact the applicant at all with respect to the Trenton job.,

24. Local 463 suggests that it had to send welders who could perform well in order to demonstrate that such work could be done properly using union labour. Christie testified that he was concerned about the job being lost to Local 463's members if Local 463 was not "flexible" in the order in which members were referred to work. On the other hand, Local 463 conceded, and the evidence establishes, that the purpose of its out-of-work lists and working rules is to prevent any kind of unfair or preferential treatment to out-of-work members, that members who had been out of work the longest would normally have been allowed to test for the Trenton job, and would have been referred to it if they had passed the test, that the unemployment insurance short-term job exception did not apply, and that Christie and Cann did not have personal knowledge of the skills, qualifications or interests of all Local 463 members, or, more specifically, the applicant. I am not satisfied that the normal hiring hall process for welders was inadequate for the Trenton job, or that Local 463 was otherwise justified in departing from it.

25. As the Board has observed in other cases, the operation of a hiring hall can be a complex matter and can require the individuals charged with the responsibility for administering it to exercise some judgment and discretion. In *John Cooper* [1984] OLRB Rep. Jan. 6, the Board observed that:

38. Neither the fact of discretion nor its exercise are, per se, illegal. Discretion is inevitable in the circumstances. The business manager must balance a number of factors in determining which of the available out-of-work members should be sent to a particular job at a particular time. In so doing, he may well make an honest mistake. But the question is not whether the business manager (and, vicariously through him the union) may have erred in some way or made a decision of which this Board, with hindsight disapproves. Business agents, being human, will make mistakes or errors in judgment and may even appear to be inconsistent from time to time as they respond to the circumstances of the moment, and perhaps, subjective pleas for special consideration. The question is whether that discretion has been abused - for example, to benefit family or friends, or to punish political enemies (see *Joe Portiss, supra*). Obviously nepotism and patronage have no place in the hiring hall system, nor should the Board condone reliance upon obviously extraneous factors. But where a union official honestly turns his mind to the circumstances at hand, and without malice or any improper intent makes a sincere effort to assess the situation and balance competing claims before dispatching employees, we do not think we should readily infer that the decision was "arbitrary" and illegal. The term "arbitrary" in section 69 was intended to connote a decision-making process that is reckless, cursory, consistent with a non-caring attitude or influenced by totally extraneous and irrelevant considerations. The facts of this case do not fall within those parameters at all.

(See also, *Thomas Beck*, [1985] OLRB Rep. Jan 14. *Antoine A. Plennevaux*, [1990] OLRB Rep. Dec. 1314).

26. As the Board's decision in *John Cooper, supra* demonstrates, honest mistakes, innocent misunderstandings and mere errors in judgment will not, of themselves constitute arbitrary or discriminatory conduct within the meaning of section 70 of the *Labour Relations Act*. A trade union has a kind of "right to be wrong" in that respect. Terms such as "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary and therefor in breach of a trade union's duty of fair representation or referral. While such strong words are apt in the more obvious cases, they do not capture the entire range of conduct which can be arbitrary. Similarly, the term "discriminatory" in both section 69 and section 70 has been interpreted broadly to include all manner of cases in which a trade union has distinguished between or treated mem-

bers differently. Consequently, whether particular conduct is arbitrary or discriminatory will depend on the circumstances.

27. In this case, I accept that Christie and Cann were entitled to exercise some judgment and discretion in administering Local 463's hiring hall. However, they were not entitled to ignore the working rules and they did not have the discretion which they purported to exercise in referring Local 463's members to employment with Stark at the Trenton job. I find that Local 463, through Christie and Cann, contravened its own hiring hall working rules and section 70 of the *Labour Relations Act* by failing to advise the applicant of the employment opportunity and by failing to give him the opportunity to test for it. I am unable to find any justification or satisfactory explanation for this improper conduct. Even assuming that it was in the best interests of Local 463 and its members for them to act as they did, and in my view it was not, there simply was no basis for the assertion that anyone's interests would have been compromised if Christie and Cann had followed the working rules. Nor does the evidence establish that any legitimate interest was advanced by referring either of the two members whose names appeared after the applicant's on the welders' out-of-work list instead of the applicant.

28. Local 463's Business Representative and Business Manager referred out-of-work members to the Trenton job on the basis of their subjective knowledge and personal opinions of members' qualifications, abilities and interests. The applicant has years of welding experience, including experience using the downhand technique, and was interested in employment of the kind available with Stark at the Trenton job. If Local 463's representatives had taken the trouble to ask him, as they were obliged to do, they would have discovered that. On the evidence, I am satisfied that the applicant should have been informed of the employment opportunity with Stark, that he should have been given an opportunity to test for that employment opportunity on July 24, 1992, that he would have tested for it, that he would have passed the test and obtained the requisite ticket, and that Local 463 should have referred him to employment with Stark on the Trenton job beginning July 27, 1992. I am also satisfied that there is no reason why the applicant could not have been offered or would not have taken this employment, and that he would in fact have accepted it.

29. In the result, I find that Local 463, through its Business Manager and Business Representative, acted in a manner which was arbitrary and discriminatory in the manner in which it referred or, in the case of the applicant, failed to refer members to work with Stark at the Trenton job, contrary to section 70 of the *Labour Relations Act*. I further find that the applicant lost the wages and benefits he would have earned or accrued had Local 463 acted properly and referred him to that employment.

#### IV Disposition

30. The Board therefore:

- (a) declares that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 has breached its duty of fair referral to the applicant, contrary to section 70 of the *Labour Relations Act*; and
- (b) orders the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 to compensate the applicant for all damages he has suffered as a result of its breach of the *Labour Relations Act*.

31. The issue of the quantum of damages is remitted to the parties to resolve if they can. I will remain seized with that issue for a period of six months from the date hereof. If the parties are

unable to resolve the issue of damages, the Board will, upon request in writing of either party, schedule a hearing to deal with it.

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**2499-92-G; 2500-92-G** United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant v. **The Hudson's Bay Company**, Responding Party; United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant, v. **The Hudson's Bay Company**, Responding Party

**Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - In response to union's grievance, employer submitting that union's bargaining rights did not cover work in construction industry and that bargaining rights, in any event, abandoned - Board finding that union's bargaining rights covering construction industry carpentry work and that bargaining rights not abandoned**

**BEFORE:** *M. A. Nairn*, Vice-Chair, and Board Members *W. A. Correll* and *G. McMenemy*.

**APPEARANCES:** *David McKee*, *Andy Root* and *Bud Calligan* for the applicants; *Harvey Beresford* and *Linda Hunter* for the responding party.

**DECISION OF THE BOARD;** June 24, 1993

1. The applicants (for purposes of this decision the "union" or the "Carpenters union") have referred two grievances concerning the interpretation, application, administration, or alleged violation of a collective agreement to the Board for final and binding determination.

2. Board File No. 2499-92-G alleges, essentially, that the responding party (the "employer" or "The Bay") improperly subcontracted work at its store at Place D'Orleans in Ottawa on July 17, 1992. Board File No. 2500-92-G alleges, essentially, that the employer made improper use of a non-union subcontractor with respect to work at three store locations in the Hamilton area on July 7, 1992. As a preliminary matter the employer raised two issues:

1. The bargaining rights upon which the applicants rely did not at any material time cover work in the construction industry and cannot therefore support a conclusion that The Bay is bound to the provincial ICI collective agreement.
2. Regardless of the nature of the bargaining rights that did exist, they have been abandoned.

This decision deals only with these preliminary questions.

3. The relevant history concerning these issues can be summarized as follows. The jurisdiction of Local 93 of the Carpenters' union covers the Ottawa area. Local 93 had bargaining rights for employees of A. J. Freiman Ltd., a retail store. Although it was not clear when these bargaining rights were obtained, it does appear they were obtained through voluntary recognition. Article 3 of their last collective agreement recognized the union as the exclusive bargaining agent for "all carpenters' and carpenters' apprentices in their employ, working in or out of the counties of Carleton (except the Township of Marlborough) and Russell and the Townships of Alfred and North

and South Plantagenet in the County of Prescott. Where the term “carpenter” is used it shall mean all the subdivisions of the trade.”

4. Article 4 outlined the work jurisdiction of the Union as follows:

The Employer acknowledges the right of the Union to jurisdiction over the work normally carried out by carpenters and joiners. Such work includes but is not limited to the following:

Carpentry work on Bridges, Wharves, Docks and Pilework; Cribmen and Timbermen, Shinglers and Siders, Acoustic Tile and Drywall Applicators, Insulators (nailed or stapled). The setting and hanging of all doors and door frames and the setting in place and fastening of all wood windows and certain types of metal windows. Metal partitions and metal trim. All rough carpentry and on-site millwork installation. The installation of Blackboards, Bulletin Boards, Tack Boards, etc. The assembling, fastening or installing of seating in theatres, halls, etc.

All falsework and the construction, erection and assembling of form work for concrete. The stripping of prefabricated panel forms designed for specific re-use. The setting of templates and anchor bolts.

The laying of Resilient Flooring and Carpeting as covered by separate Agreement.

5. In addition Article 7 required the employer to employ only members of the union for work within its jurisdiction and prohibited the subcontracting of work within the jurisdiction of the union except to a contractor in contractual relations with it.

6. A representative of A. J. Freiman’s advised the union by letter dated January 4, 1971 that this collective agreement would continue through any industry negotiations for a new contract and that the company would, at such time as a new contract was ratified, agree to be bound to its terms retroactive to the date it took effect.

7. That letter also raised an issue concerning certain benefits for the two carpenters then employed. By letter dated February 15, 1971 the union agreed to a proposal whereby these employees would receive certain fringe benefits paid to all employees of A. J. Freiman, in exchange for a reduced hourly wage payment.

8. At that time the two carpenters employed by Freiman’s worked out of a shop where they manufactured “bunks”, free-standing table-type fixtures with drawers. These bunks held inventory and were used for display purposes in the retail store. The carpenters would also work in the store setting out the bunks in accordance with a prearranged plan and be involved in any changes to a department that required perimeter work, for example preparing walls, or installing standards which would receive brackets for shelving. The carpenters did minor repairs, laminating or re-gluing, fixing broken shelves, repairing of doors, replacing flooring. They hung doors if required for department renovation or for stock room or fitting room purposes. They would relocate cash stations by repositioning existing fixtures. They would also do this same type of work for seasonal displays, for example, “creating” toyland at Christmas. According to both Mr. Sauve, Store Manager with A. J. Freiman’s and later Operations Manager with The Bay for the Ottawa Region, and Mr. McKenny, then Local 93’s Business Agent, A. J. Freiman’s historically did renovation and remodelling work by hiring local trades through the hiring hall and the carpenters employed by the store were involved in that work in those earlier years as well.

9. In 1971 Hudson’s Bay Company purchased A. J. Freiman’s. A collective agreement was entered into between Local 93 and Hudson’s Bay Company dated August 4, 1973 which continued in effect until April 30, 1975.

10. Articles 3 and 4 of that agreement set out the same recognition clause and work jurisdiction as the agreement with A J. Freiman's. Article 7 also required the employer to employ only members of the union for work within its jurisdiction and not to subcontract any work within the jurisdiction of the union except to a contractor in a bargaining relationship with the union. The union also agreed to a wage differential in order to provide the employees involved with certain benefits provided by the company.

11. The parties agreed that these collective agreements reflected the then standard carpenters' construction agreement. As a matter of practice, Local 93 would negotiate with the Ottawa Construction Association. After those negotiations were concluded the union would approach various employers that were not members of the Association and have them sign the same or similar agreement individually. Employers would not be approached unless active in the area.

12. Remittance forms for the union's welfare trust fund submitted on behalf of carpenters at Hudson's Bay Company show that three employees were employed through the very early months of 1974. In spring, 1974 that number reduced. Over the summer of 1974 there were two employees. It appears that from December, 1974 until September, 1975 there was one carpenter employed. Although no witness could pinpoint the precise date, the parties were in agreement that from the latter part of 1975, as part of a larger downsizing, there were no more carpenters directly employed by The Bay.

13. Notice to bargain was given to Hudson's Bay Company for the renewal of the 1975 agreement by letter dated January 21, 1975. Mr. Roger Smith, the Regional Personnel Manager for the Ottawa Region from January 1975 to March 1978 recalled Mr. McKenny approaching him for the purpose of re-negotiating the collective agreement. He recalls, as does Mr. McKenny, a meeting between the two wherein Mr. Smith advised Mr. McKenny that The Bay was no longer going to employ carpenters. While there was some dispute concerning their precise recollection, Mr. Smith does acknowledge he would have advised Mr. McKenny that The Bay intended to use contractors when there was carpentry work to be performed. There was no suggestion in the evidence that Mr. Smith informed Mr. McKenny that the company would be using handymen to do in-store work. Rather, Mr. Smith recalled informing Mr. McKenny that the carpentry skill was no longer required in-house and the two agreed not to renegotiate the contract. No further negotiations were entered into. This exchange appears to have taken place in October, 1975. The union felt there was no point in negotiating when there were no employees. Although his evidence was not entirely clear on this point it appears Mr. McKenny felt (rightly or wrongly) that the union's bargaining rights were protected either because the agreement continued in effect until it was changed or that it continued until a no-board report was released.

14. Following the purchase in 1971, the first most noticeable and immediate change to the work of the two carpenters employed was the closing of the separate shop facility. The Bay no longer made its own fixtures. These two individuals continued to be involved in the location and repair of fixtures, hanging of doors, replacing floor tiles, expanding/changing departments seasonally or in the context of small renovation work, and continuing any necessary perimeter work.

15. The two carpenters were also only peripherally involved in renovation work for The Bay after its purchase in 1971 until their departure in 1975. For the period following the purchase up to April 1978 (the commencement of province-wide bargaining) three projects were identified. In 1975 a renovation of the fourth floor of the Rideau store was contracted to a Russ Wilson. Concerned that non-union carpenters were on-site, Mr. Chretien, then Assistant Organizer for the union, approached the store management and found out the contractor's name. The union already had bargaining rights with the contractor and the matter was settled when the employees involved

joined the union. Two major renovation projects were undertaken in the Ottawa region, an overhaul of the "home store", and renovations to the St. Laurent store. Both jobs were contracted out and were completed during 1976-77. The evidence does not disclose with certainty who the contractors were. Mr. Sauve could not specifically recall major renovations between October 1975 to April 1978 but could recall two Montreal contractors and a Manitoba supplier. Mr. Smith could recall the jobs but not the contractors as he was not involved in the letting of contracts. Mr. McKenny recalled work on the restaurant at the St. Laurent store and that union carpenters were used. Mr. Chretien recalls supplying approximately fifteen carpenters to the home store job site but recalls little of the St. Laurent job. Mr. McMahon agreed that the two named Montreal contractors, Cohen and Pauze, were unionized. He was aware of new store construction only. The parties' records were either not available or did not disclose specific enough information to track these jobs. On the basis of this evidence we are satisfied that it is reasonable to conclude that the bulk, if not all, of the carpentry work performed on these jobs was performed by unionized contractors.

16. After the two carpenters left, The Bay used persons referred to as handymen in each store location to look after certain needs of each store. They were assisted by staff from the receiving dock as necessary, particularly with respect to the relocation of fixtures.

17. The work they performed was essentially the same work that had been performed by the two carpenters who were employed by The Bay. Mr. McKenny was not surprised to learn that individuals other than carpenters were performing small jobs and the union did not object. Mr. McKenny felt it would have been unreasonable to require the employer to contract out such small amounts of work and noted it was a fine distinction sometimes between construction carpentry work and what was merely maintenance work. The more obvious of these jobs performed during this period would have been the seasonal repositioning of the bunks and the perimeter work including the moving of shelving. The movement of shelves might occur without the necessity for moving the standards. Mr. Bustard, the Assistant General Manager for the Ottawa area acknowledged that the handymen would have been mostly engaged in departmental or seasonal moves and the maintenance of lighting or clean-up activities. They would also occasionally work on the dock helping to unload trucks. He indicated that there would not have been much, if any work, in the nature of hanging doors. None of the witnesses could recall any project requiring the laying of tile during the period up to 1978 although there had perhaps been the occasional small repair of broken tile.

18. Although a number of the company's witnesses either could not recall any interaction with the union or were not aware of any bargaining relationship with the union, Mr. Smith had been referred to the collective agreement when he took over in 1975. He understood it to cover the two carpenters employed at that time. In his view very little carpentry work was happening and after late 1975 he was no longer responsible for any employed carpenters. No one advised the union that employees might be performing work that had been previously performed by the carpenters. The letting of renovation projects was outside Mr. Smith's authority as the responsibility of Operations not Personnel.

19. None of the company witnesses could recall receiving any information concerning the introduction of province-wide bargaining in the period preceding 1978. It was agreed that the collective agreement entered into by the union with the Ottawa Construction Association for the term 1975 to 1977 did not include the Hudson's Bay Company. Similarly, a contract entered into from May 1, 1977 until April 30, 1978 between the Ottawa Construction Association and the union did not include the Hudson's Bay Company. No notice to bargain was provided to The Bay in 1977 for the renewal of an agreement leading up to provincial bargaining.

20. There is no evidence that The Bay was notified following the introduction of province-wide bargaining that they were affected, either by the Ottawa Construction Association (of which it had not been a member) or by the union. The union's own records of contractors in the Ottawa area with whom they have a bargaining relationship include a listing for the Hudson's Bay Company going back at least to 1975. The Bay was included on a list of employers with whom Local 93 had bargaining rights, prepared by Local 93 for the Carpenters Bargaining Conference leading up to province-wide bargaining.

21. There were a number of construction projects engaged in by the employer across Ontario. Mr. Smith was employed in the Toronto Region from 1978 until 1986 but was unaware of any collective bargaining obligations. Mr. Douglas McMahon was the individual responsible for coordinating the trades on construction sites from as early as 1972. In the 70's he worked primarily in the western provinces. In 1976 he was in Montreal and acknowledged that very little company construction was going on in Ottawa at that time. Mr. McMahon's understanding with respect to any collective bargaining obligations was that contractors in contractual relations with the union were required to be used only in new construction, particularly where stores were built in malls, but not in existing facilities. He had never heard of the Ottawa collective agreement and had not had any contact with the union.

22. In 1975 a new store had been constructed in the the Ottawa area and unionized contractors had been used. Between 1982 and 1990 approximately eight to ten new stores were opened across Ontario either in new malls or as additions to existing malls. The contractors used were all unionized.

23. Mr. McMahon compiled a list of construction renovation projects that had taken place in stores that appear to be primarily in the Metropolitan Toronto area (i.e. Board Area 8) between 1982 and 1992, which indicates that from time to time both union and non-union contractors were used. Of twenty-nine drywall contracts, one was let to a non-union contractor in 1982 for work on the fourth floor of The Bay's Yonge and Bloor Street store. Also in 1982 unionized drywall contractors performed work on floors 1, 2, 3 and 5 of the same store. Of twenty-nine millwork contracts, ten were let to three non-union contractors between 1987-1991. Eight of the ten went to the same non-union contractor and all ten were in different store locations. Of twenty-nine floor covering contracts, ten were let to four non-union contractors. One was let in 1982 for the 1st floor of the Yonge and Bloor store while in 1982 work on floors 2, 3, 4, and 5 were let to unionized contractors. The remaining nine contracts were let between 1987-1991 all at different locations.

24. We have no evidence concerning how the bidding and contracting was conducted, the size of the various jobs either in terms of dollar amounts or duration nor do we know how complete a representation of the employer's construction work the list represents. There is no evidence that the union was aware of particular work being performed or of any use of non-union personnel on any of these jobs. It may be that the performance of at least some of these "non-union" contracts overlapped with the performance of "unionized" contracts. It is also likely that at least some of these projects were reasonably visible, and that a local union should have been aware of at least some of the projects (for example the recent Queen Street store renovations).

#### Nature of the Bargaining Rights

25. The employer acknowledges that the collective agreement was in the form of the standard Ottawa Construction Association collective agreement but argues that at all material times, the bulk of the work performed by the employees was either shop work, fixture moving or maintenance work - none of which constitutes construction industry work according to the Board's jurisprudence.

26. The employer argues that the Board has regularly held that employees doing both construction industry work and non-construction industry work cannot be treated as construction industry employees for the purposes of an application for certification under the Act. Similarly, it argues, a trade union cannot seek to impose the construction industry provisions of the Act on an employer by virtue of voluntary recognition if the work being performed is not in fact construction industry work particularly where the effect of such a decision would be to sweep The Bay into a provincial agreement when the original bargaining rights were not construction industry bargaining rights and would not have been recognized as such by the Board.

27. For these reasons the employer asserts, the Board should find that Local 93 never held construction industry bargaining rights for the employees of either Freiman's or The Bay. As a result, The Bay is not covered by the Carpenters' provincial collective agreement and Local 93 cannot maintain its referral under the construction industry provisions of the Act. Similarly, Local 18 cannot claim any violation of the provincial agreement and its referral should be dismissed.

28. In response, the applicant queries whether one might phrase this question as, did it ever occur to the drafters and signatories to the successive collective agreements between the Ottawa Construction Association and Carpenters Local 93 that they were creating bargaining rights in anything other than the construction industry? The agreement signed by The Bay contains provisions common to a construction industry collective agreement including a typical construction industry recognition clause, a work jurisdiction clause which refers to construction industry work, a reference to the Impartial Jurisdictional Disputes Board in Washington, and a typical construction industry subcontracting provision and hiring hall requirement. The applicant also makes reference to among others, Article 9 which requires the parties to abide by the *Construction Safety Act* and Article 17 which provides for one hour's notice of lay-off or dismissal, which the applicant asserts, would have been unlawful if the parties were not engaged in construction industry work.

29. The applicant argues that an employer cannot sign a collective agreement clearly covering work in the construction industry and then later seek to rely on evidence to argue that it could not do so and refers to *Ewing Construction Ltd.*, unreported decision of the Board, January 27, 1986. In any event, the applicant says, the factual evidence is clear from both Mr. Sauve and Mr. McKenny that the carpenters employed by The Bay performed work in the construction industry including, perimeter work (shelving or standards and brackets), hanging doors, replacing tiles, construction work associated with the seasonal expansion of departments, to which Mr. McKenny added drywall repair and installation, and moving and constructing partition walls.

30. The applicant acknowledges that the amount of construction work done by The Bay (and perhaps by the carpenters) declined during the 1970's. However even if some of the work performed in isolation was not work in the construction industry, a construction industry collective agreement can be, and often is, applied to work outside of strictly construction industry work and refers to *E.P.S.C.A.*, [1990] OLRB Rep. Oct. p. 1031.

31. In any event, the applicant argues, the actual division of time between construction and "non-construction" work engaged in by the carpenters at The Bay is irrelevant in the context of a voluntary collective agreement, and refers to *J.C. Milne Construction Company (Canada) Inc.* [1979] OLRB Rep. March, p. 220. If employees worked in both construction and non-construction work and the parties chose to execute a construction industry collective agreement to cover the terms and conditions of employment, then they are free to do so. The collective agreement creates bargaining rights in the construction industry.

32. The evidence is entirely consistent with the conclusion that the bargaining rights held for A. J. Freiman's were intended to cover the construction industry. The agreement is a standard

construction industry collective agreement. A. J. Freiman's performed its own construction work and used the Carpenters' hiring hall to obtain carpenters. The two carpenters directly employed by A. J. Freiman's had been members of the union. Did the parties intend anything different at The Bay? The agreement itself discloses no material difference. Nor is the evidence of Mr. Smith that he would not have done or said anything to bind The Bay to using unionized contractors sufficient to suggest a different intention. Mr. Smith's responsibility extended only to the two direct hires. The letting of contracts was the responsibility of Operations. While that assignment of responsibility may explain Mr. Smith's caution, and perhaps why Mr. Sauve in Operations was unaware of any collective agreement obligations, it is not sufficient to speak to the nature of the obligations created given the clear language of the agreement itself.

33. Should the Board look behind the parties agreement to assess as the employer asserts, "the legitimacy or legality of those bargaining rights at a later date"? On an application for certification the Board would determine whether or not the employer was engaged in work in the construction industry so as to determine whether the construction industry provisions of the Act were appropriately applicable. Similarly, in an application for certification, the Board would determine the number of employees engaged in construction work on the application date in order to determine the list of employees appropriate for inclusion in the construction industry bargaining unit(s). That is necessary in order to determine whether or not the applicant enjoys the requisite support to be entitled to certification.

34. This is not an application for certification. Bargaining rights were initially obtained through voluntary recognition. Once obtained the nature of bargaining rights do not change depending on the particular work that an employer may be engaged in from time to time. There is no evidence that a separate or replacement "maintenance" agreement was ever contemplated, nor was any agreement negotiated between the union and The Bay which would reflect an intention that the union's bargaining rights were not intended to cover construction work. Conversely, the fact that Local 93 agreed not to renegotiate the 1975 collective agreement does not reflect on the nature of the bargaining rights held.

35. In *Ewing Construction Limited*, *supra* the Board did not allow the responding employer to call evidence to contradict the clear language of the agreement entered into. The employer sought to show that at the time of signing a voluntary recognition agreement it had no employees contrary to the express words of that agreement. The Board noted that parties in the construction industry must be able to rely on clear and unambiguous provisions that are contained in agreements freely entered into. The Board noted that that would not necessarily preclude someone not a party to the agreement but affected by it, from challenging its legitimacy. There was no suggestion here that the language of the collective agreement itself is ambiguous. The argument was that the employees that were treated as being covered by that agreement were not performing construction work or were performing both construction and non-construction work and that that reflected on the nature of the bargaining rights expressed in the agreement. We do not agree and find therefore that the bargaining rights held by the Carpenters union for both A. J. Freiman's and The Bay were bargaining rights covering construction industry carpentry work.

#### Abandonment of Bargaining Rights

36. The responding party relies on a period of some seventeen years during which it says no attempt was made by the union to contact anyone within The Bay anywhere in Ontario, in circumstances where work was performed without the union and implicitly without adhering to the provisions of any collective agreement. The responding party refers to among others, *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523, *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357,

*Lorne's Electric*, [1987] OLRB Rep. Nov. 1405 and urges us to adopt the approach in *Marineland of Canada*, [1990] OLRB Rep. Dec. 1298 and examine both pre and post 1978 conduct as a continuum of conduct showing abandonment. In addition, responding counsel relies on his arguments in *Marineland* in support of the proposition that bargaining rights can be abandoned after the advent of provincial bargaining. The parties agree that the question of whether there has been an abandonment of bargaining rights by a trade union is a factual question in each case. The applicant asserts that an intention to abandon bargaining rights has not been shown, and reviews, among others, the cases relied on by the employer.

37. The cases are clear that the degree of activity required on the part of the union so as to retain its bargaining rights depends on the circumstances of each case. For a general review of the principles regarding the issue of abandonment see *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 at paragraphs 4 and 5; *R. Reusse Co. Ltd.*, *supra*, at paragraph 13; and *Lorne's Electric*, *supra*, at paragraphs 14-16.

38. A. J. Freiman's and The Bay took a different approach to construction projects. After its purchase, the Bay stopped employing carpenters and began purchasing fixtures and contracting the construction carpentry work. All the employer's witnesses agreed there was little construction activity in the Ottawa region leading up to province-wide bargaining. The Rideau store project was performed using a unionized contractor. The union had in 1975 asserted its rights regarding the Russ Wilson contract. That fact is equally consistent with asserting rights that arose out of the sub-contracting provision in The Bay collective agreement or as a result of the union's own relationship with Russ Wilson. We have already concluded on the evidence that the bulk if not all of the other two identified projects used unionized contractors. There is nothing in the evidence to suggest that the union was less than vigilant in protecting its interests in respect of these projects. They were completed in 1977 and no further construction was undertaken in the area before province-wide bargaining was introduced. The union was also satisfied that the new store in 1975 in Ottawa was being built using unionized contractors, and the evidence discloses that to be the case.

39. The two carpenters directly employed had left by the latter part of 1975. The parties agreed not to renegotiate the 1975 collective agreement. Does this lead to the conclusion that the union abandoned its bargaining rights? There is no doubt that Local 93 could have acted to better protect its interests, even where those interests might be limited to protecting the sub-contracting clause. Yet this was not a situation of mere inaction on the union's part. The parties agreed they would not renegotiate the collective agreement. Evidence of belief and intention is always difficult to assess and is of limited value in the absence of conduct. What however could Mr. McKenny reasonably take from his conversation with Mr. Smith? Did Mr. Smith put the union on notice that as far as The Bay was concerned its collective bargaining obligations were over at that point? No. Subsequently the Bay acted in a manner consistent with those obligations by contracting renovations in Ottawa out to unionized contractors. Does the agreement not to renegotiate suggest that Mr. McKenny believed the union's bargaining rights were limited to carpenters directly employed? In light of the express words of the collective agreement, the union's history with A. J. Freiman's and its more limited experience with The Bay including both the Rideau store renovation and the construction of the new store - both in 1975 - we do not think such a conclusion is reasonable. In that context even apart from Mr. McKenny's stated belief that the bargaining rights were protected his failure to insist on renegotiating the collective agreement, while perhaps not prudent, is explainable. Mr. Chretien did later supply carpenters to the St. Laurent renovation in 1976-77 consistent with a conclusion that bargaining rights continued. Is the fact of the use of handymen performing the work in-store relevant? The union either believed that the work was maintenance work or was not concerned that small repair jobs were being performed using non-union personnel and in light of the statement by Mr. Smith that carpentry skill was no longer going to be needed in-

house, it is reasonable to conclude that the union would not have focussed on those individuals even assuming they were aware of them.

40. After late 1975, there was little contact with the union in circumstances where the union had been told that no carpenters were to be employed in-store and carpentry work was to be contracted out. Projects contracted out went to union contractors and carpenters were referred from the hiring hall in 1976-77. If we were to consider post-1978 conduct, it would be conduct of Local 93 that would be probative in our view in light of Local 93's advice to the Carpenters Bargaining Conference that it held bargaining rights for The Bay. There is no evidence of any construction activity in the Ottawa area after 1978 against which rights could be asserted. A lack of contact by the local union in that circumstance, within the framework of province-wide bargaining, provides little if any assistance in assessing its conduct pre-1978. On the evidence we are unable to conclude that there was any abandonment of bargaining rights prior to the introduction of province-wide bargaining. These facts are readily distinguishable from *R. Reusse Co. Ltd.* where, having obtained bargaining rights in 1965 and 1966 for different geographic areas, the union in that case did nothing to negotiate renewals, administer those agreements, or to contact the employer up to 1978, notwithstanding open activity on the part of the employer. The facts in *Marineland of Canada, supra* are also distinguishable.

41. After the introduction of province-wide bargaining The Bay engaged in construction work in some Board Areas and not others. There is no evidence for example, of construction work within Local 93's jurisdiction (until the filing of this grievance) against which Local 93 could assert its rights. To the extent there were other Board Areas in which no construction work occurred and against which no opportunity to assert rights existed for those A.B.A.'s, there is no evidence to suggest they abandoned bargaining rights. Moreover, in those areas where The Bay did engage in construction work all new construction was performed by unionized contractors in various locations across the province. Much of the renovation work was also performed using unionized contractors. Local 27's conduct in respect of projects within Board Area 8 does not evidence a strong defence of its bargaining rights. However, even assuming that bargaining rights can be abandoned within the scheme of province-wide bargaining, the facts in this case would not support that conclusion.

42. The parties are hereby directed to contact the Registrar within ten days of the date of this decision to advise her whether or not the parties are able to resolve the remaining issues in dispute, failing which, the matter is to be scheduled for hearing to deal with any and all outstanding issues.

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**0182-93-R** Randy A. Burke, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Responding Party v. **Venture Industries Canada, Ltd.**, Intervenor

**Practice and Procedure - Reconsideration - Termination - Board exercising its discretion under section 105(2)(i) of the *Act* to refuse to entertain subsequent termination application where employee wishes with respect to representation were tested in earlier termination application - Board declining to impose bar on further termination applications - Termination application dismissed - Reconsideration application dismissed**

**BEFORE:** *G. T. Surdykowski*, Vice-Chair, and Board Members *G. O. Shamanski* and *D. A. Patterson*.

**APPEARANCES:** *Randy A. Burke* for the applicant; *Michelle McPhee*, *Dan Flynn*, *D. Charlton* and *J. Parker* for the responding party; *Anna Vannelli* and *Francine LeBlanc* for the intervenor.

**DECISION OF THE BOARD;** June 7, 1993

1. This is an application for a declaration terminating the bargaining rights which the responding trade union (the "CAW") holds with respect to "all regular plant employees of Venture Industries Canada, Ltd. at its plant in Wallaceburg, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, and students employed during the summer vacation." Although originally made under sections 58, 59, 60 and 61 of the *Labour Relations Act*, it became clear at the hearing on May 25, 1993 that section 58(2)(a) was the only applicable provision.

2. At the hearing, the CAW moved that the Board exercise its discretion under section 105(2)(i) of the *Act* to refuse to entertain this application, and, further, that the Board bar termination applications like this one for a period of ten months.

3. The applicant voiced some objection to the Board entertaining the motion because it had not been "filed" by the terminal date. Although the CAW did not fully particularize its motion prior to its May 18 and 20, 1993 letters in that respect, after the terminal date, the issue was sufficiently raised and identified in the CAW's reply which was filed by the terminal date. The Board therefore considered it appropriate to hear the motion.

4. The material facts in that respect were not in dispute. The CAW was certified by the Board on March 15, 1989. It was unable to negotiate a collective agreement with the intervenor and applied to the Board for a direction that a first collective agreement be arbitrated. That direction was granted and subsequently a collective agreement was arbitrated. This collective agreement was effective July 23, 1990 and expired on July 22, 1992. The CAW gave notice to bargain a new collective agreement to the intervenor in June, 1992. Subsequently, the CAW and the intervenor met to bargain on July 9, August 14, and August 19, 1992. On August 13, 1992, two employees (neither of whom was the applicant herein) filed an application for a declaration terminating the CAW's bargaining rights (Board File No. 1446-92-R - the "first application"). At their August 19, 1992 meeting, the CAW and the intervenor agreed to suspend further collective bargaining pending the disposition of the first application.

5. By decision dated March 5, 1993, the Board (differently constituted) determined the voter eligibility issues which arose in the first application. The Board held that all three persons

whose eligibility to vote was in dispute were entitled to vote and directed that their ballots, which had been segregated, be counted.

6. By letter dated April 1, 1993, the intervenor sought reconsideration of that decision. By decision dated April 21, 1993, the Board dismissed this request for reconsideration, and, because not more than fifty per cent of the ballots cast in the representation vote had been marked against the CAW, dismissed the first application.

7. By letter dated May 6, 1993, the intervenor renewed its request for reconsideration and requested that its request be put before a different panel of the Board. This May 6, 1993 request had not been dealt with by the Board at the time this application came on for hearing on May 25, 1993. Nor was it before this panel at that time.

8. The CAW and the intervenor met to bargain again on April 15, 1993. They were unable to conclude a collective agreement. On the same day, this application was filed (that is, before the first application had actually been dismissed).

9. The CAW submitted that the Board should refuse to entertain this application and bar further such applications because the employee's wishes had been tested in the first application and the CAW and intervenor had not had a reasonable opportunity to bargain since the first application had been disposed of. The CAW submitted that there were no special circumstances which justified permitting this application to proceed on the heels of the first.

10. The applicant pointed out that it had been nearly a year since the first collective agreement had expired and that the employees he "represented" were not happy with the CAW, which he said had accomplished nothing for them. He argued that the vote in the first application, which was a tie vote, proved nothing and that it was appropriate to give the employees another vote.

11. The intervenor submitted that the Board's practice is to exercise its discretion to refuse to entertain an application like this one only where numerous previous applications have been dismissed within a short period. It submitted that it was not the Board's practice to refuse to entertain a second application. Further, the intervenor stated that there are different employees in the bargaining unit now than when the first application was made. It argued that this constituted a special circumstance such that when balancing the competing interests of the trade union and the employees, the employees should be given the vote they have requested. The intervenor submitted that the question of the bar should have been raised in the first application, and that while the Board could refuse to entertain a subsequent application by other employees, it could only bar the actual previous unsuccessful applicants.

12. Upon considering the representations of the parties, the Board ruled, orally, that it has the jurisdiction to refuse to entertain this application and that it found it appropriate, in the circumstances, to do so. However, assuming the Board has the jurisdiction to do so, the Board declined to impose a bar as requested by the CAW. In making this ruling, the Board indicated that it understood and was sensitive to the concerns expressed by the applicant and the tensions which obviously existed in the bargaining unit. However, the employee's wishes have recently been tested, the CAW has not had a reasonable opportunity to bargain since then, and the Board was not satisfied that there were special circumstances which made it appropriate to proceed with this application. In the result, this application was dismissed.

13. In making this determination, the Board considered the Board's decisions referred to by the parties; namely, *7-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791, *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. Apr. 468, and *Browning-Ferris Industries Ltd.*, [1982]

OLRB Rep. Sept. 1253. In addition, in *Cara Operations Limited*, [1992] OLRB Rep. March 295 (request for reconsideration dismissed June 16, 1992, unreported), the Board dealt with a similar motion to the one herein as follows:

8. The respondent argued that the representation issued raised by this application had been tested and determined in the first application and that the respondent has not had a reasonable opportunity to pursue collective bargaining since then. The respondent urged the Board to balance what is characterized as being the competing interests and policy considerations behind sections 58 and 105(2)(i) (that is, the representation interest versus the protection of existing collective bargaining relationships) by dismissing this application with a bar. The respondent argued in that in balancing the two interests the Board should ask itself the following questions:

- (1) has the applicant had a fair chance to raise the representation issue?
- (2) if so, has the union had a reasonable opportunity to bargain since that issue was disposed of?
- (3) are there any exceptional circumstances?

In support of its position, the respondent relied upon the Board's decisions in *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 792; *Dunville Supermarket Limited*, [1980] OLRB Aug. 193; *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 and [1982] OLRB Rep. Sept. 1253; *Storwall International Inc.*, [1985] OLRB Rep. Nov. 1679 and *R.L.D. Electric*, [1986] OLRB Rep. Aug. 1145, and it submitted that, in this case, the Board should conclude that the questions it had submitted should be answered "Yes", "No", and "No", and that the application should therefore be dismissed with a bar.

9. The applicant agreed that it was appropriate to seek a balance between the right to test representation rights and the right to maintain and pursue a collective bargaining relationship. However, counsel submitted that the true wishes of the employees had not been tested with respect to the representation issue in this case and that the disruption to the collective bargaining relationship complained about by the respondent is inherent in any termination application and is therefore specifically contemplated by the Act. Counsel sought to distinguish the cases relied upon the respondent and also referred to the Board decisions in *Soo Dairies Limited*, [1971] OLRB Rep. July 439 and *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91. The applicant argued that balancing of interests in this case favoured allowing this application to proceed in order to permit the representation issue to be truly tested.

10. The intervener employer quite properly took no position with respect to the respondent's motion as such. It limited its submissions to the denying the respondent's allegations, in argument, that the intervener had refused to bargain and to responding to the applicant's complaints with respect to the quality of the list of employees filed in the first application.

11. The situation before the Board in this case was analogous to one in which a trade union applies to be certified for a bargaining unit of employees already represented by another trade union, discovers that it has miscalculated its membership position, subsequently seeks to withdraw its application, but has its application dismissed because of the stage of the proceedings. In those circumstances, a subsequent application by the same union would not generally be dismissed by the Board in the exercise of its discretion under section 105(2)(i) of the Act, mainly because the Board does not consider that the representation issue in such circumstances has been both raised and determined. Accordingly, the first question is not quite as characterized by the respondent. As the Board's jurisprudence demonstrates, that question is not just whether there has been a fair opportunity to raise the representation issue, but whether the representation issue has been raised and determined.

12. As the Board said in the often quoted paragraph 16 of *Seven-Up (Ontario) Limited*, *supra*:

16. The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in deter-

mining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, *once a representation issue has been dealt with on its merits* and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

[emphasis added]

13. Certainly, the mere fact that there has been one representation application which has been dismissed does not mean that a second one, made soon after, should necessarily not be entertained by the Board. In order for the Board to properly exercise its discretion to entertain a representation application which is otherwise properly made, it must, in our view, be satisfied that the representation issue was truly determined in the first proceeding and that, in all the circumstances, it is appropriate to refuse the second one to proceed in the interest of labour relations stability. *Seven-Up (Ontario) Limited, supra, Dunville Supermarket Limited, supra, Browning-Ferris Industries, supra, Storwall International Inc., supra, and R.L.D. Electric, supra*, are all examples of cases in which the Board was so satisfied. *Soo Dairies Limited, supra* and *Repac Construction & Materials Limited, supra* are examples of circumstances in which the Board was not so satisfied. The jurisprudence also demonstrates the idiosyncratic nature of such cases.

14. Obviously, discretionary determinations such as this, must be made judiciously on the basis of the circumstances peculiar to each case. It is neither possible nor appropriate to establish a catalogue or set of rules in that respect. In this instance, the Board was satisfied that, in the circumstances of described, the situation was analogous to that described in paragraph 11 above. The Board was satisfied that, what appears to be a very real representation issue was not truly determined in the first application, and that in the interests of both short and long term labour relations considerations, it should be. We find it neither necessary nor appropriate to comment further.

15. The respondent's motion under section 105(2)(i) of the Act is therefore dismissed aforesaid.

In dismissing a request that the Board reconsider that decision, the Board wrote:

10. Perhaps the analogy drawn in paragraph 11 of our March 13, 1992 decision, to which the respondent so strongly objects (even though one of the cases upon which the respondent relies in support of its request for reconsideration, *Trinidad Leaseholds (Canada) Ltd.* 52 CLLC ¶. 17005, suggests that very analogy) is imperfect. However, the dismissal of the respondent's motion under section 105(2)(i) of the Act did not depend upon that analogy. The point of it was to demonstrate that the "... question is not just whether there has been a fair opportunity to raise the representation issue, but whether the representation issue has been raised and determined."

11. Section 105(2)(i) of the Act gives the Board the power:

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

This provision gives the Board a broad discretion. It does not require any particular result.

12. The Board's jurisprudence, both as set out in the written submissions of the parties and otherwise, includes cases in which the Board has exercised its discretion to impose a section 105(2)(i) bar and cases in which the Board declined to do so. As a result, certain practices or policies had developed in the sense that the Board's tendency to treat like case alike results in a

certain predictability to the Board's response to given situations. For example, the Board generally imposes a six month bar where employee have been tested by a representation vote and an application has been dismissed for lack of employee support. However, the Board is not bound to impose a bar even in such cases.

13. No practice or policy can be more than a general guideline. The very nature of practices and policies is such that there must be limits and exceptions to them, especially in matters of discretion. No practice or policy is written in stone, and cannot operate as a fetter on the proper exercise of the Board's discretion. The Board's practices and policies must both reflect labour relations reality and be responsive to individual cases.

14. The dismissal of a certification or termination application does not, by itself, constitute a basis for refusing to entertain a subsequent application or imposing a bar (see, for example, *General Freezer Limited*, (1962) 63 CLLC p. 16294; *Dalacoustic Contractors Ltd.* [1971] OLRB Rep. Jan. 22; *Soo Dairies Limited*, [1971] OLRB Rep. July 439; *Freuhauf Trailer Company of Canada Limited*, [1974] OLRB Rep. Jan. 6; *Repac Construction & Materials Limited*, [1978] OLRB Rep. Jan. 91 and *Storwal International Inc.*, [1985] OLRB Rep. Nov. 1679). Indeed, apart from cases in which a representation vote was taken, or where an application has obviously been withdrawn to avoid a vote, the Board has been reluctant to bar or refuse to entertain a subsequent representation application except in exceptional circumstances, such as where there had been numerous unsuccessful applications within a short period of time (see, for example, *J. W. Crooks Co. Ltd.*, [1972] OLRB Rep. Feb. 126; *Repac Construction & Materials Ltd.*, *supra*; *Campbellford Memorial Hospital*, [1978] OLRB Rep. Aug. 722; *Erie & Huron Beverages Ltd.* [1979] OLRB Rep. July 640; *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954; and *Storwal International Inc.*, *supra*).

15. In this case, the parties met with a Labour Relations Officer with respect to the first application, but their only appearance before the Board was to make submissions with respect to the applicant's request for leave to withdraw that application. The only determination which the Board made in the first application was with respect to that request and not with respect to anything having to do with the merits of the representation issue raised in that application, and subsequently in this one. In addition to and quite apart from the analogy drawn in paragraph 11 of our March 13, 1992 decision, we were not satisfied that the representation issue had been determined in the first application. Further, there was nothing before the Board, then or now, which suggested that either the first application or this one was frivolous, vexatious or made for any improper purpose, and it was our sense that the labour relations interest in having the representation issue finally determined on its merits outweighed the respondent's collective bargaining interest. Accordingly, we found it appropriate to exercise our discretion to not refuse to entertain this application and impose a bar as requested by the respondent trade union.

14. As the Board pointed out in *Cara Operations Limited*, *supra*, the legislative scheme of the *Labour Relations Act* attempts to balance employee wishes with respect to representation and collective bargaining stability. In this case, collective bargaining between the CAW and the intervenor began in a timely manner. There was no suggestion that anything unusual had occurred in that respect before it was interrupted, relatively early in the collective bargaining process, by the first termination application, or that there was anything wrong with suspending that collective bargaining pending the disposition of the first application. It was apparent that all concerned expected that the first application would be dismissed before the Board decision in that respect actually issued. The CAW and the intervenor resumed bargaining on April 15, 1992 and this application was filed on the same day, six days before the Board dismissed the first application. The ability of the CAW and the intervenor to engage in collective bargaining was again impaired, even before the first application had been formally disposed of. It was readily apparent that the CAW and intervenor have not had a reasonable opportunity to bargain a new collective agreement.

15. On the other hand, the employee wishes with respect to representation were tested in the first application. That application was dismissed because the applicants for termination lost the vote. Although the vote result in the first application suggests that the CAW enjoys something less

than their enthusiastic support, the bargaining unit employees have had a full opportunity to express their wishes. Further, the fact that there has been a change in the actual composition of the bargaining unit does not constitute a special or exceptional circumstance which justifies retesting the employee wishes so soon after the first application was dismissed. Employees who have just entered or re-entered a bargaining unit must take the situation as they find it. It would be unrealistic and unduly disruptive to collective bargaining to require a trade union to establish that it enjoys the support of the bargaining unit it represents every time there is a change in the employees who make up that bargaining unit.

16. In the result, the Board was satisfied that the CAW should have an opportunity to pursue collective bargaining and that it was appropriate for the Board to exercise its discretion not to entertain this application (which discretion we were satisfied the Board has for the reasons given in *Browning-Ferris Industries Ltd.*, *supra*). The application was therefore dismissed as aforesaid.

17. However, the Board was not satisfied that it could or should bar either this or other bargaining unit employees from making a further termination application. For the reasons given in the *Blue Cross* case (*supra*, at paragraph 28), the applicant herein is not an “unsuccessful applicant” for the purposes and within the meaning of section 105(2)(i) of the Act. Nor are bargaining unit employees other than the actual applicants in the first application. Further, and in the alternative, we were not satisfied that it would be appropriate to impose a bar where, as in this case, the employees have been without a collective agreement for nearly a year. While the CAW is entitled to an opportunity to bargain, it and the intervenor may not be entitled to the same luxury of time which they may have enjoyed in July and August, 1992.

18. It may be that a further termination application will be filed. Certainly, the CAW is on clear notice that there is dissatisfaction in this bargaining unit. Whether the Board will entertain any subsequent termination application will depend on the circumstances, including when it is made and what has transpired in the interim. It would be inappropriate for us to make any further comment in that respect.

19. On May 31, 1993, as this written decision was being prepared, the Board received the following letter from the applicant:

In a recent hearing with the O.L.R.B. on Tuesday May 25, 1993 at 9:30 A.M. in reference to my application on termination of the C.A.W. bargaining rights at Venture Industries in Wallaceburg, Ontario. I say that the panel of the three men who sat on the panel that day did not give me a fair hearing.

When an application is put forth with 9 out of 13 names on it, of people who do not wish to have the C.A.W. represent them. That application is turned down, I think there has been a great injustice done.

The chairman said “that the union has not had sufficient time to negotiate”. Well, 9 employees think they have. I think we should have been given a chance, not only to defend our petition, but to have a vote. I felt that the chairman’s attitude was that, he did not really care what I had to say, or for that matter what the other employees wanted. I know we’re only a small plant, but we consider ourselves, very important to the economy.

We feel that if not given an opportunity to vote the Union is going to put us right out of a job.

I conclude this letter by pleading with you to reconsider our jobs, families, and our well being. Let us have a vote as to whether or not, the C.A.W. Local 127 should have bargaining rights or not.

Listed here you will find the names of all the employees who do not wish the union be in control and bargain for us and our jobs.

20. The Board's decision in this case was a unanimous one, made by the whole panel, not just the Vice-Chair. The panel listened to and carefully considered the representations of *all* the parties, including the applicant. All of the parties, including the applicant, had a full opportunity to make whatever representations they wished with respect to the CAW's motion that the Board should exercise its discretion to refuse to entertain this application. In concluding that the Board should not entertain this application, the panel considered the legitimate interests and expectations of all parties. In that respect, and as we have already noted, the employees in this bargaining unit have recently had an opportunity to express their representation wishes. On the other hand, the CAW has not had an opportunity to bargain.

21. To the extent that the applicant's post-hearing letter constitutes a request for reconsideration, it asserts no fact and makes no representations which the applicant did not already make at the hearing on May 25, 1993, and which the Board considered at the time. Indeed, the applicant's letter does nothing more than express his dissatisfaction, and the apparent dissatisfaction of his supporters, with the Board's decision. The fact that one or more parties or affected persons is not satisfied with a decision (which is almost always the case when a labour relations matter is litigated) is not a reason to reconsider that decision. Nor is there any other reason for the Board to reconsider its decision herein, and the Board declines to do so.

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## COURT PROCEEDINGS

**3178-91-G (Court File No. 384/92) Toronto-Dominion Bank, Applicant v. United Brotherhood of Carpenters and Joiners of America Local 785, Ontario Labour Relations Board, Attorney General of Canada and Attorney General of Ontario, Respondents**

**Constitutional Law - Construction Industry - Construction Industry Grievance - Judicial Review - Board dismissing employer's submission that construction of banks within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance - Bank seeking judicial review - Divisional Court finding construction of new bank building to be ordinary construction activity and within provincial jurisdiction - Judicial Review application dismissed - Motion for leave to appeal dismissed by Court of Appeal**

Board decision reported at [1992] OLRB Rep. Oct. 1123.

*Ontario Court of Justice (Divisional Court), Southey, Campbell and Dunnet JJ., March 17, 1993.*

**Southey J. (endorsement):** The test for constitutional jurisdiction is the test of correctness.

This is not a case like *Pioneer* (1980) 107 D.L.R. (3d) 1 (S.C.C.) where the institutional test was necessary to distinguish the work of banks from the work of near banks.

The functional test governs the analysis of federal/provincial labour jurisdiction in federal under-

takings and federally regulated industries. *Montcalm Construction* [1979] 1 S.C.R. 754; *Four B v. OLRB & Chief Brant* [1980] 1 S.C.R. 1031 at 1047; *Northern Telecom* (1979) 79 CLLC 136 at p. 143; (1983) 83 C.L.L.C. 14,048.

The question is not whether the bank's construction department is a separate corporate undertaking, but whether its subsidiary construction operation - in this case the construction of a new independent non-union contractor - is vital, essential, or integral to the banking function and therefore integral to the primary federal jurisdiction over banking.

The construction of a new bank building is ordinary construction activity. No banking is transacted at a construction site. Construction forms no integral part of the bank's banking operation. The temporary operation of construction is separate and distinct from the ongoing operation of banking.

Neither the physical task of constructing a new building nor the bank's new building construction operation is integral, vital, essential or necessary to the core banking function.

Notwithstanding Mr. Gray's very able argument, the application is dismissed.

[*The Bank's motion for leave to appeal this decision was dismissed by the Court of Appeal for Ontario on June 14, 1993 per Morden A.C.J.O., Robins and Doherty JJ.A.: Editor*]







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## APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1993

### APPLICATIONS FOR CERTIFICATION

#### Bargaining Agents Certified Without Vote

**1166-92-R:** Ontario Public Service Employees Union (Applicant) v. Family Service Bureau of South Waterloo (Respondent)

Unit #1: "all employees of Family Service Bureau of South Waterloo in the City of Cambridge, save and except supervisors and persons above the rank of supervisor, employees employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit)

Unit #2: "all employees of Family Service Bureau of South Waterloo in the City of Cambridge regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (3 employees in unit)

**3065-92-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Formrydt Foundations (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Formrydt Foundations in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Formrydt Foundations in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

**3074-92-R:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Metropolitan Toronto Civic Employees Union, Local 43, the Canadian Union of Public Employees (Intervener)

Unit: "all carpenters and carpenters' apprentices, in the employ of The Municipality of Metropolitan Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and persons for whom any other trade union held bargaining rights as of January 27, 1993" (2 employees in unit) (*Having regard to the agreement of the parties*)

**3395-92-R:** Office and Professional Employees International Union (Applicant) v. Workplace Health and Safety Agency (Respondent)

Unit: "all employees of the Workplace Health and Safety Agency in the Municipality of Metropolitan Toronto and the City of Mississauga, save and except Directors and persons above the rank of Director, General Counsel, Systems Manager, Warehouse Manager, Office Manager, Executive Secretaries to the Vice-Chairs, Executive Secretary to the Executive Director, Assistant to the Executive Director, Secretary to the Director of Human Resources and staff seconded from other organizations to the Workplace Health and Safety Agency" (31 employees in unit) (*Having regard to the agreement of the parties*)

**3607-92-R:** United Food and Commercial Workers Union, Local 175 (Applicant) v. Collingwood Nursing Home Ltd. (Respondent)

Unit: “all employees of Collingwood Nursing Home Ltd. in the Town of Collingwood, save and except Supervisors, persons above the rank of Supervisor, Registered and Graduate Nurses and office and clerical staff” (37 employees in unit) (*Having regard to the agreement of the parties*)

**3789-92-R:** Amalgamated Transit Union, Local 616 (Applicant) v. Transit Windsor (Respondent)

Unit: “all employees of Transit Windsor in Windsor, who are regularly employed for not more than 24 hours per week, save and except supervisors, including operations supervisors, persons above the rank of supervisor, secretary to the General Manager, secretary to the Operations Manager, the Human Resources Clerk/Assistant, Accountant, Computer Supervisor, the Transportation Scheduler, the Purchasing Agent, the Transportation Planner, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of March 24, 1993” (7 employees in unit) (*Having regard to the agreement of the parties*)

**3816-92-R:** Retail, Wholesale and Department Store Union (Applicant) v. Vitto Brand Foods Ltd. (Respondent)

Unit: “all employees of Vitto Brand Foods Ltd. in the Regional Municipality of Sudbury, save and except assistant foremen and persons above the rank of assistant foreman, sales, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0038-93-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Marc Maisonneuve Construction (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Marc Maisonneuve Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Marc Maisonneuve Construction in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**0039-93-R:** Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all employees of Ontario Guard Services Inc. working at 400 Beacon Hill Drive in the Town of Aurora, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (7 employees in unit) (*Having regard to the agreement of the parties*)

**0040-93-R:** Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc. (Respondent)

Unit: “all security guards employed by Ontario Guard Services Inc. working at the Sunlife Centre (including the Merryll Lynch Building) at both north corners of King and University Avenue in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0045-93-R:** Industrial and Commercial Workers’ Union (Applicant) v. Guardsman Products Limited (Respondent)

Unit: “all employees of Guardsman Products Limited in its Resins Division in the City of Cornwall, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and persons for whom any trade union held bargaining rights as of the date of application, April 5, 1993” (10 employees in unit) (*Having regard to the agreement of the parties*)

**0103-93-R:** Amalgamated Transit Union, Local 741 (Applicant) v. 947465 Ontario Ltd. c.o.b. Voyageur Limousine and Van Services (Respondent)

Unit: “all employees of 947465 Ontario Ltd. c.o.b. Voyageur Limousine and Van Services in its Para-Transit

Service Division operating in the City of London, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, maintenance staff, office and clerical staff and mechanics” (26 employees in unit) (*Having regard to the agreement of the parties*)

**0104-93-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Culinar Inc. (Respondent)

Unit: “all employees of Culinar Inc. in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

**0105-93-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Culinar Inc. (Respondent)

Unit: “all employees of Culinar Inc. in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0110-93-R:** Ontario Public Service Employees Union (Applicant) v. Children’s Aid Society of the Regional Municipality of Waterloo (Respondent)

Unit: “all employees of Children’s Aid Society of the Regional Municipality of Waterloo in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of the date of application, April 8, 1993” (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0129-93-R:** Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Housekeeping Systems Ltd. (Respondent) v. First Maintenance Services Ltd. (Intervener)

Unit: “all employees of Nova Housekeeping Systems Ltd. engaged in cleaning and maintenance at 10, 16 and 20 York Mills Road, York Mills Centre in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (22 employees in unit) (*Having regard to the agreement of the parties*)

**0149-93-R:** Ontario Secondary School Teachers’ Federation (Applicant) v. Renfrew County Board of Education (Respondent)

Unit: “all office and clerical employees of Renfrew County Board of Education in the County of Renfrew, save and except Managers and Assistant Managers, persons above the rank of Manager and Assistant Manager, Administrative Assistants, Chief Accountant, Para-professional employees, Supervisors in the Plant Operations and Maintenance Department and persons for whom any trade union held bargaining rights as of the date of application, April 14, 1993” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0150-93-R:** Association des Professionnels du Cefcut - APC (Applicant) v. Le Conseil des écoles Françaises de la Communauté Urbaine de Toronto (Respondent)

Unit: “Tout le personnel du Conseil des écoles françaises de la communauté urbaine de Toronto de la municipalité de la communauté urbaine de Toronto qui exécute un travail au bureau administratif du conseil à l’échelle II, groupe 1 à 10 ainsi que l’échelle I à l’exception des personnes dont le classement est égale à ou supérieur à l’échelle II groupe 11, ainsi que l’Agent du Personnel, l’Adjointe administrative en relations de travail, l’Adjointe administrative en dotation du personnel, les Secrétaires de séances et l’Adjointe administrative du bureau du Directeur de l’éducation, et tout le personnel au nom de qui un syndicat détient des droits de négociations en date du 14 avril 1993” (12 employees in unit) (*Having regard to the agreement of the parties*)

**0165-93-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Erosion Control Gabions Ltd. (Respondent)

Unit: “all employees of Erosion Control Gabions Ltd. in the City of Vaughan, save and except Superintendents, persons above the rank of Superintendent and employees in bargaining units for which any trade union held bargaining rights as of April 13, 1993” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0190-93-R:** United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Kelloryn Inns (Aurora) Inc. (Respondent)

Unit: “all employees of Kelloryn Inns (Aurora) Inc. in the City of Aurora, save and except supervisors, persons above the rank of supervisor, front desk, office and clerical staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

**0206-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at the Chrysler Plant in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

**0207-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at Dowty Aerospace, 574 Monarch Drive in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

**0208-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Manitoba Pool - 1 Grain Elevator in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0210-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Port Arthur Shipyards in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

**0211-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Manitoba Pool - 3 Grain Elevator in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

**0213-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

Unit: “all Security Guards in the employ of Apex Investigation & Security Inc. at Saskatchewan Wheat Pool - 4A & B Grain Elevator in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, Mobile Patrol Officers, Security System Installers, Investigators, office, sales and clerical staff” (3 employees in unit) (*Having regard to the agreement of the parties*)

**0223-93-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. H. O. Trerice Co. (Respondent)

Unit: “all employees of H. O. Trerice Co. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (27 employees in unit) (*Having regard to the agreement of the parties*)

**0226-93-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Beltina Inc. (Respondent)

Unit: "all truck drivers in the employ of Beltina Inc. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Having regard to the agreement of the parties*)

**0230-93-R:** Brewery, General and Professional Workers' Union (also known as Brewery, Malt and Soft Drink Workers, Local 304) (Applicant) v. Senator Hotels Limited (Respondent)

Unit: "all employees of Senator Hotels Limited in the City of Timmins, save and except department heads, persons above the rank of department head, confidential secretary to the General Manager and those employees for whom any trade union held bargaining rights on the date of application April 16, 1993" (7 employees in unit) (*Having regard to the agreement of the parties*)

**0247-93-R:** Office and Professional Employees International Union (Applicant) v. Greenpeace Canada (Respondent)

Unit: "all employees of Greenpeace Canada in the City of Hamilton, save and except Assistant Canvass Directors and persons above the rank of Assistant Canvass Director" (18 employees in unit) (*Having regard to the agreement of the parties*)

**0252-93-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation engaged in cleaning and maintenance at Commerce Court East - 21 Melinda Street; Commerce Court West - 199 Bay Street; Commerce Court North - 25 King Street West; and Commerce Court South - 30 Wellington Street West in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office and clerical staff" (93 employees in unit) (*Having regard to the agreement of the parties*)

**0255-93-R:** Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Kingston Access Bus (Respondent)

Unit: "all employees of Kingston Access Bus regularly employed for not more than 24 hours per week in the City of Kingston, save and except Managers, persons above the rank of Manager and office staff" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0256-93-R:** IWA - Canada (Applicant) v. Brough & Whicher Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Brough & Whicher Limited at R. R. #1 Wiarton, in the County of Bruce, save and except supervisors, persons above the rank of supervisor, office and sales staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

**0263-93-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hayes-Dana Inc. (Respondent)

Unit: "all employees of Hayes-Dana Inc. in the Town of St. Marys, in the County of Perth, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (195 employees in unit) (*Having regard to the agreement of the parties*)

**0266-93-R:** Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Green Belt Mechanical Inc. (Respondent)

Unit: "all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material han-

dlers in the employ of Green Belt Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers in the employ of Green Belt Mechanical Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

**0267-93-R:** Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Group Home For Deaf/Blind Persons (Brantford) Inc. (Respondent)

Unit: "all employees of the Group Home for Deaf/Blind Persons (Brantford) Inc. in the City of Brantford, save and except Executive Director, Program Coordinator and those above such ranks" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

**0270-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 660 Monarch Avenue in the Town of Ajax, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (2 employees in unit)

**0271-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 882 Stevenson Road South in the City of Oshawa, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

**0272-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of the Group 4 C.P.S. Limited at 47 Liberty St. South in the Town of Bowmanville, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (2 employees in unit)

**0273-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 177 Nonquon Road in the City of Oshawa, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

**0274-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 2001 Forbes Street in the Town of Whitby, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

**0275-93-R:** IWA - Canada (Applicant) v. Forestply Industries Inc. (Respondent)

Unit: "all employees of Forestply Industries Inc. at its plant operations in the Municipality of Blind River, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week" (46 employees in unit) (*Having regard to the agreement of the parties*)

**0276-93-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Bruce Area Solid Waste Recycling Association Inc. (Respondent)

Unit: "all employees of Bruce Area Solid Waste Recycling Association Inc. in the County of Bruce, save and except managers, persons above the rank of manager, office and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

**0279-93-R:** United Food and Commercial Workers Union, Local 175 (Applicant) v. 810048 Ontario Ltd., c.o.b. as Loeb Highland (Respondent)

Unit: “all employees of 810048 Ontario Ltd., c.o.b. as Loeb Highland in the City of Cambridge, save and except Managers, persons above the rank of Manager, and persons for whom any trade union held bargaining rights as of April 27, 1993” (183 employees in unit) (*Having regard to the agreement of the parties*)

**0281-93-R:** United Steelworkers of America (Applicant) v. Circlet Food Inc. (Respondent)

Unit: “all employees of Circlet Food Inc. in the City of Vaughan, save and except foremen, persons above the rank of foreman, office, sales and technical staff” (87 employees in unit) (*Having regard to the agreement of the parties*)

**0293-93-R:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. Nordik Windows Inc. (Respondent)

Unit: “all employees of Nordik Windows Inc. in the Village of Vars in the Township of Russell, save and except foremen, persons above the rank of foreman, persons employed for not more than 24 hours per week, students employed during the school vacation period, office, clerical and sales staff” (25 employees in unit) (*Having regard to the agreement of the parties*)

**0307-93-R:** Retail, Wholesale and Department Store Union (Applicant) v. Northern Uniform Service Corp. (Respondent)

Unit: “all employees of Northern Uniform Service Corp. in the Regional Municipality of Sudbury, save and except foremen and persons above the rank of foreman” (32 employees in unit) (*Having regard to the agreement of the parties*)

**0309-93-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Heaton Sanitation Ltd. (Respondent)

Unit: “all employees of Heaton Sanitation Ltd. in the County of Essex, save and except Operations Manager and persons above the rank of Operations Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

**0311-93-R:** Ontario Public Service Employees Union (Applicant) v. (A.C.C.E.S.) Accessible Community Counselling and Employment Services for New Canadians (Respondent)

Unit: “all employees of (A.C.C.E.S.) Accessible Community Counselling and Employment Services for New Canadians in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of April 28, 1993” (10 employees in unit) (*Having regard to the agreement of the parties*)

**0313-93-R:** Service Employees' Union, Local 210 (Applicant) v. Bruce Resthome Ltd. carrying on business as Pelee Days Inn (Respondent)

Unit: “all employees of Bruce Resthome Ltd. carrying on business as Pelee Days Inn in Leamington, Township of Mersea, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period” (24 employees in unit) (*Having regard to the agreement of the parties*)

**0327-93-R:** Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicants) v. Eldin Sheet Metal Mechanical Ltd. (Respondent)

Unit: “all journeymen sheet metal workers and apprentice sheet metal workers in the employ of Eldin Sheet Metal Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and apprentice sheet metal workers in the employ of Eldin Sheet Metal Mechanical Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

**0347-93-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Imperial Parking Limited (Respondent)

Unit: “all employees of Imperial Parking Limited operating as IMPARK in the Municipality of Metropolitan Toronto, save and except Training Supervisor, Site Managers, persons above the rank of Site Manager, sales, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (63 employees in unit) (*Having regard to the agreement of the parties*)

**0348-93-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Metropolitan Parking Inc. (Respondent)

Unit: “all employees of Metropolitan Parking Inc. at 225 Front Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (10 employees in unit) (*Having regard to the agreement of the parties*)

**0353-93-R:** Ontario Public Service Employees Union (Applicant) v. Beaver Foods Limited (Respondent)

Unit: “all employees of Beaver Foods Limited at Ottawa-Carleton Detention Centre in the City of Gloucester, save and except Assistant Managers and persons above the rank of Assistant Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

**0361-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all Security Guards in the employ of Group 4 C.P.S. Limited at 33, 35 and 77 Falby Court in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

**0362-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards in the employ of Group 4 C.P.S. Limited at 70 Cumberland Lane in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0363-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards in the employ of Group 4 C.P.S. Limited at 901 McKay Road in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

**0364-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: “all security guards in the employ of Group 4 C.P.S. Limited at 45 Cumberland Lane in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff” (5 employees in unit)

**0366-93-R:** Public Service Alliance of Canada (Applicant) v. Moosonee Development Area Board (Respondent)

Unit: “all employees of the Moosonee Development Area Board, save and except Chief Administrative Officer, persons above the rank of Chief Administrative Officer, Secretary-Treasurer, Fire Chief, Manager of Public Works, Manager of Recreation Services, Coordinator of the Family Resource Centre and the Manager of Airport Services” (28 employees in unit) (*Having regard to the agreement of the parties*)

**0367-93-R:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Delro Metal Erectors Limited (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Delro Metal Erectors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all

ironworkers and ironworkers' apprentices in the employ of Delro Metal Erectors Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman all ironworkers and ironworkers' apprentices in the employ of Delro Metal Erectors Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0375-93-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. B.C. Finish Carpentry Co. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of B.C. Finish Carpentry Co. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of B.C. Finish Carpentry Co. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

**0423-93-R:** Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Granite Club, Limited (Respondent)

Unit: "all employees of Granite Club, Limited in its Food and Beverage Department in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, casual banquet wait staff, office and sales staff, Cashiers, Head Porters, Audio-Visual Technicians and employees in bargaining units for which any trade union held bargaining rights as of May 10, 1993" (89 employees in unit) (*Having regard to the agreement of the parties*)

**0427-93-R:** Public Service Alliance of Canada (Applicant) v. Ian Martin Associates Limited (Respondent)

Unit: "all Security Guards in the employ of Ian Martin Associates Limited at Moose Factory General Hospital in the Local Services Board of Moose Factory, save and except General Manager and persons above the rank of General Manager" (7 employees in unit) (*Having regard to the agreement of the parties*)

**0437-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 1150 Stevenson Road South in the City of Oshawa, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

**0438-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 580 Harwood Avenue South in the Town of Ajax, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

**0439-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited at 199 Wentworth Street East in the City of Oshawa, save and except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

**0440-93-R:** Canadian Security Union (Applicant) v. Group 4 C.P.S. Limited (Respondent)

Unit: "all Security Guards in the employ of Group 4 C.P.S. Limited in the Town of Port Perry, save and

except Supervisors, persons above the rank of Supervisor, sales, office and clerical staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

**0468-93-R:** IWA-Canada (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent)

Unit: "all employees of Madawaska Hardwood Flooring Inc. in the Town of Renfrew, save and except foremen, persons above the rank of foreman, office, sales and purchasing staff, persons regularly employed for not more than 24 hours per week and persons employed under a government-sponsored training program" (40 employees in unit) (*Having regard to the agreement of the parties*)

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**0033-93-R:** Canadian Union of Public Employees (Applicant) v. St. Olga's Lifecare Centre (Martino Nursing Centres) (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: "all employees of St. Olga's Lifecare Centre (Martino Nursing Centres) at Hamilton, Ontario and as specified in Schedule "A" of the collective agreement, save and except office staff, Registered Nurses, Director of Nurses and those above the rank of Director of Nurses" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of ballots marked in favour of applicant	29
Number of ballots marked in favour of intervener	24

**Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**1122-91-R:** Labourers' International Union of North America, Local 183 (Applicant) v. J. I. Construction (Respondent) v. International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Intervener)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of J. I. Construction in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0

**2548-92-R:** Ontario Secondary School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent) v. Independent Canadian Transit Union, Local 9 (Intervener)

Unit: "all employees of The Carleton Board of Education engaged in custodial services, maintenance and plant operations, save and except forepersons and persons above the rank of foreperson, office and clerical staff, persons employed under a work incentive program sponsored by other than the employer, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of November 27, 1992" (394 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	430
Number of persons who cast ballots	332

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	320
Number of ballots marked in favour of applicant	213
Number of ballots marked against applicant	107
Number of ballots segregated and not counted	12

**3015-92-R:** Carleton Administration Support Certified Employees Association (Applicant) v. The Carleton Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all library technicians, audio-visual technicians, guidance service technicians, computer technicians and kitchen technicians employed by the Carleton Board of Education in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, and students employed in co-operative education programs" (50 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	19
Number of ballots marked in favour of no union	6
Number of ballots segregated and not counted	4

**3132-92-R:** Ontario Public Service Employees Union (Applicant) v. Network North, The Community Mental Health Group (Sudbury Algoma Hospital) (Respondent)

Unit: "all office and clerical employees of Network North, The Community Mental Health Group (Sudbury Algoma Hospital) in the Regional Municipality of Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation periods, save and except supervisors and persons above the rank of supervisor, Human Resources employees and employees in bargaining units for which any trade union held bargaining rights as of January 29, 1993" (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3

**3447-92-R:** Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Sarnia (Respondent) v. Sarnia Municipal Administrative Employees' Association ("SMAEA") (Intervener)

Unit: "all employees of the Corporation of the City of Sarnia in the City of Sarnia, save and except Directors, persons above the rank of Director, students employed during the school vacation period, students employed in a co-operative program and persons for whom any trade union held bargaining rights as of February 25, 1993" (149 employees in unit)

Number of names of persons on revised voters' list	149
Number of persons who cast ballots	118
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	109
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of ballots marked in favour of applicant	83
Number of ballots marked in favour of intervener	26
Number of ballots segregated and not counted	9

**3769-92-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Leon's Furniture Limited (Respondent)

Unit: "all employees of Leon's Furniture Limited working in the City of Windsor, save and except managers and persons above the rank of manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5

### **Applications for Certification Dismissed Without Vote**

**0962-90-R:** International Union of Operating Engineers, Local 793 (Applicant) v. 340480 Ontario Limited o/a Concrete Forming (1980) (Respondent) (4 employees in unit)

**1364-92-R:** International Union of Bricklayers and Allied Craftsmen, Local 5, (Applicant) v. Corporation of City of St. Thomas (Respondent) v. Canadian Union of Public Employees (Intervener) (2 employees in unit)

**1444-92-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Corporation of City of St. Thomas (Respondent) (2 employees in unit)

**2978-92-R:** United Steelworkers of America (Applicant) v. Trilea Centres Inc. (Respondent) (7 employees in unit)

**3763-92-R:** Amalgamated Clothing & Textile Workers Union (Applicant) v. Hornco Plastics Inc. and Horn Plastics Ltd. (Respondents) (58 employees in unit)

**0265-93-R:** United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Cambu Drywall Ltd. (Respondent) (2 employees in unit)

### **Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote**

**0002-93-R:** Christian Labour Association of Canada (Applicant) v. Pinecrest Manor Nursing Home (Respondent) v. Service Employees' Union, Local 210 (Intervener)

Unit: "all employees of Pinecrest Manor Nursing Home in Lucknow, Ontario, save and except Professional Medical staff, Registered Nurses, Graduate Nurses, Physiotherapists, Occupational Therapists, Supervisors, persons above the rank of Supervisor and office staff." (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of ballots marked in favour of applicant	28
Number of ballots marked in favour of intervener	31

### **Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**1228-91-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. J.I. Construction (Respondent)

Unit: "all bricklayers, bricklayers' apprentices and construction labourers in the employ of J.I. Construction in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton

within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0

**2119-91-R:** Labourers' International Union of North America, Local 527 (Applicant) v. M.C.Y Construction (1989) Ltd. (Respondent)

Unit: “all construction labourers in the employ of M.C.Y. Construction (1989) Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

**2763-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Decor Insulation & Drywall Ltd (Respondent)

Unit: “all carpenters and carpenters' apprentices in the employ of Decor Insulation & Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Decor Insulation & Drywall Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (24 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	5

**3588-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds Lemmerz Industries (Respondent)

Unit: “all employees of Reynolds-Lemmerz Industries in the Town of Collingwood, save and except Lead Hand and persons above the rank of Lead Hand, office, clerical, sales staff and security guards” (486 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	489
Number of persons who cast ballots	468
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	458
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of spoiled ballots	9

Number of ballots marked in favour of applicant	188
Number of ballots marked against applicant	261
Number of ballots segregated and not counted	10

**3718-92-R:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Knapp Plastics Limited Partnership (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Knapp Plastics Limited Partnership in the Town of Leamington, save and except Supervisors, persons above the rank of Supervisor, Quality Assurance Auditors, Quality Assurance Technicians, Paint Inspectors, Weekend Mould Technicians, office, clerical and sales staff, security guards and pending the resolution of the dispute excluding as well Lead Hands and Section Leaders" (379 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	379
Number of persons who cast ballots	318
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	107
Number of ballots marked against applicant	208
Number of ballots segregated and not counted	3

### **Applications for Certification Withdrawn**

**3131-92-R:** Teamsters Local Union 938 (Applicant) v. Pepsi-Cola Canada Ltd. (Respondent) v. Group of Employees (Objectors)

**0061-93-R:** International Union of Operating Engineers, Local 793 (Applicant) v. Blue-Con Construction Inc. (Respondent)

**0083-93-R:** United Steelworkers of America (Applicant) v. Circlet Food Inc. (Respondent)

**0100-93-R:** Canadian Union of Public Employees (Applicant) v. Metropol Security A Division of Barnes Security (At the Metro Toronto Library) (Respondent)

**0168-93-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Limited (Respondent)

**0209-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

**0212-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

**0249-93-R:** Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Limited (Respondent)

**0336-93-R; 0380-93-R:** International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Harold Security Services Limited (Respondent)

**0374-93-R:** United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Bockstael Construction (1979) Limited (Respondent)

**0460-93-R:** Canadian Union of Public Employees (Applicant) v. Regional Municipality of Niagara Public Health Services Department (Respondent)

**0528-93-R:** Canadian Security Union (Applicant) v. Apex Investigation & Security Inc. (Respondent)

## APPLICATION FOR COMBINATION OF BARGAINING UNITS

**3646-92-R:** Ontario Nurses' Association (Applicant) v. The Regional Municipality of Sudbury (Pioneer Manor - Home For The Aged) (Respondent) (*Granted*)

**3793-92-R:** Amalgamated Transit Union, Local 616 (Applicant) v. Transit Windsor (Respondent) (*Granted*)

**3804-92-R:** Ontario Public Service Employees Union (Applicant) v. Kenora Association for Community Living (Respondent) (*Granted*)

**0254-93-R:** Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Kingston Access Bus (Respondent) (*Granted*)

## FIRST AGREEMENT - DIRECTION

**3401-92-FC:** United Steelworkers of America (Applicant) v. LMH Hotel Operations Limited c.o.b. as Ramada Hotel 400/401 (Respondent) (*Granted*)

**0552-93-FC:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. Fischer-Hallman Service Center Inc. (Respondent) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2808-91-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Granted*)

**3151-91-R:** Millwright District Council of Ontario on its own behalf and on behalf of Local 1244 (Applicant) v. Inplant Contractors Inc. and 911846 Ontario Limited c.o.b. as Flint Industrial Services and Flint Riggers and Erectors Inc. (Respondents) (*Dismissed*)

**3431-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Granted*)

**0248-92-R:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local 1000 (Applicant) v. Regis Corporation and Seligman and Latz of Polo Park Limited and other corporate entities listed on Schedule "A" to the applications (Respondents) (*Withdrawn*)

**0863-92-R:** United Brotherhood of Carpenters and Joiners of America Local 249, United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Rosmar Drywall & Acoustics Ltd., Canaan Construction Inc. (Respondents) (*Dismissed*)

**1010-92-R:** Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 539 (Applicant) v. #515422 Ontario Ltd, c.o.b. as Woodstock Roofing and Sheet Metal, Great Northern Industries Inc., G.N.I. Construction Ltd. (Respondents) (*Dismissed*)

**1303-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rosmar Drywall & Acoustics Ltd. and Canaan Construction Inc. (Respondents) (*Dismissed*)

**1305-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Westcon Construction Ltd., 792207 Ontario Limited c.o.b. as Marbrook Homes, 707931 Ontario Limited and 641850 Ontario Inc. c.o.b. as West Garden Homes (Respondents) (*Granted*)

**1865-92-R:** United Steelworkers of America (Applicant) v. Mr. Crispy's Limited and/or Mr. Crispy's Corporated and/or Danbury Sales and/or Mr. Larry North (Respondents) (*Withdrawn*)

**1980-92-R:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and Marble Tile and Terrazzo Union Local 31 (Applicants) v. Ellis Don Limited and Marathon Realty Company Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

**2565-92-R:** Graphic Communications International Union, Local 500M (Applicant) v. Superior Engravers Limited, R.G. Samson Holdings Inc. (Respondents) (*Withdrawn*)

**3432-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wickstead-Manor Millwork Ltd., J. Wiedeman Contracting Limited (Respondents) (*Withdrawn*)

**3520-92-R:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. John Hayman & Sons Company Limited, Ontario and King Ltd. (Respondents) (*Withdrawn*)

**3526-92-R:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Kota Drywall Limited and ESA Acoustics & Drywall Limited (Respondents) (*Withdrawn*)

**3717-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ross D. Neill Limited and Dalacoustic Contractors Limited (Respondents) (*Granted*)

**0178-93-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. 452918 Ontario Limited c.o.b. as Agincourt Drywall and 740783 Ontario Inc. c.o.b. as Whitby Drywall (Respondents) (*Withdrawn*)

**0330-93-R:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. #951103 Ontario Ltd., c.o.b. as Brunet Heating and Air Conditioning and N.H. Reid Commercial, R.J. Brunet c.o.b. as R.J. Brunet Sheet Metal (Respondents) (*Granted*)

**0390-93-R:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Peacock Interior Finishes Limited, Peacock Fasteners & Building Specialties Inc., 456202 Ontario Inc. (Respondents) (*Granted*)

## SALE OF A BUSINESS

**2807-91-R:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Dismissed*)

**3150-91-R:** Millwright District Council of Ontario on its own behalf and on behalf of Local 1244 (Applicant) v. Inplant Contractors Inc. and 911846 Ontario Limited c.o.b. as Flint Industrial Services and Flint Riggers and Erectors Inc. (Respondents) (*Dismissed*)

**3431-91-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Granted*)

**0249-92-R:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local 1000 (Applicant) v. Regis Corporation and Seligman and Latz of Polo Park Limited and other corporate entities listed on Schedule "A" to the applications (Respondents) (*Withdrawn*)

**0864-92-R:** United Brotherhood of Carpenters and Joiners of America Local 249, United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Rosmar Drywall & Acoustics Ltd., Canaan Construction Inc. (Respondents) (*Dismissed*)

**1010-92-R:** Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Asso-

ciation, Local 539 (Applicant) v. #515422 Ontario Ltd, c.o.b. as Woodstock Roofing and Sheet Metal, Great Northern Industries Inc., G.N.I. Construction Ltd. (Respondents) (*Dismissed*)

**1303-92-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rosmar Drywall & Acoustics Ltd. and Canaan Construction Inc. (Respondents) (*Dismissed*)

**1305-92-R:** Labourers' International Union of North America, Local 183 (Applicant) v. Westcon Construction Ltd., 792207 Ontario Limited c.o.b. as Marbrook Homes, 707931 Ontario Limited and 641850 Ontario Inc. c.o.b. as West Garden Homes (Respondents) (*Granted*)

**1866-92-R:** United Steelworkers of America (Applicant) v. Mr. Crispy's Limited and/or Mr. Crispy's Corporated and/or Danbury Sales and/or Mr. Larry North (Respondents) (*Withdrawn*)

**2564-92-R:** Graphic Communications International Union, Local 500M (Applicant) v. Superior Engravers Limited, R.G. Samson Holdings Inc. (Respondents) (*Withdrawn*)

**3432-92-R:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wickstead-Manor Millwork Ltd., J. Wiedeman Contracting Limited (Respondents) (*Withdrawn*)

**3520-92-R:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. John Hayman & Sons Company Limited, Ontario and King Ltd. (Respondents) (*Withdrawn*)

**3526-92-R:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Kota Drywall Limited and ESA Acoustics & Drywall Limited (Respondents) (*Withdrawn*)

**3648-92-R:** United Food and Commercial Workers Union, Local 1000A (Applicant) v. 564171 Ontario Ltd., conducting business as Dieter and Darcy's No Frills, and Loblaw Companies Ltd. (Respondents) (*Withdrawn*)

**3717-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ross D. Neill Limited and Dalacoustic Contractors Limited (Respondents) (*Granted*)

**0178-93-R:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. 452918 Ontario Limited c.o.b. as Agincourt Drywall and 740783 Ontario Inc. c.o.b. as Whitby Drywall (Respondents) (*Withdrawn*)

**0330-93-R:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. #951103 Ontario Ltd., c.o.b. as Brunet Heating and Air Conditioning and N.H. Reid Commercial, R.J. Brunet, c.o.b. as R.J. Brunet Sheet Metal (Respondents) (*Granted*)

**0390-93-R:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Peacock Interior Finishes Limited, Peacock Fasteners & Building Specialties Inc., 456202 Ontario Inc. (Respondents) (*Granted*)

## UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

**3516-92-R:** L'Association des enseignantes et des enseignants franco-Ontariens (Applicant) v. Le Conseil des écoles séparées catholiques des comtés de Stormont, Dundas et Glengarry (Respondent) (*Granted*)

**3517-92-R:** L'Association des enseignantes et des enseignants franco-Ontariens (Applicant) v. Le Conseil des écoles séparées catholiques du district de Nipissing (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**2458-92-R:** Employees of 598142 Ontario Limited carrying on business as Spooners' Restaurant (Applicant) v. The Retail, Wholesale and Department Store Union, Local 448 (Respondent) v. 598142 Ontario Limited c.o.b. as Spooners' Restaurant (Intervener)

Unit: "all employees of 598142 Ontario Limited c.o.b. as Spooners' Restaurant at London, Ontario, save and except Department Managers and persons above the rank of Department Manager, office and clerical staff" (49 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	18
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	14
Number of ballots segregated and not counted	0

**3434-92-R:** Evelyn Thomson and Wanda Papke (Applicant) v. Christian Labour Association of Canada (Respondent) (*Granted*)

Unit: "all employees located at 671 2nd Avenue East at Owen Sound, save and except the administrator and registered and graduate nurses employed in a nursing capacity" (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	13

**3628-92-R:** Wayne Welden (Applicant) v. Christian Labour Association of Canada (Respondent) v. Ray of Hope Inc., Hope Manor (Intervener)

Unit: "all employees of Ray of Hope Inc., at Hope Manor in the Regional Municipality of

Waterloo, save and except Assistant Programme Directors and persons above the rank of Assistant Programme Director, social worker and office and clerical staff" (32 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	26
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	23
Number of ballots segregated and not counted	0

**3827-92-R:** Giuseppe (Joe) Ronald Rubino, Paul Adragna, Claudio Adragna, Renato Adragna, and Fortunato Teresa (Applicant) v. Local 444 C.A.W. - Formerly Great Lakes Fishermen and Allied Workers Union (Respondent) v. Four Brothers Fishing Co. Limited (Intervener) (*Granted*)

**0176-93-R:** Gurdev Singh (Applicant) v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Ltd., Aarport Limousine Services Ltd. (Intervener) (*Granted*)

**0294-93-R:** Poornand Srikant (Applicant) v. United Steelworkers of America (Respondent) v. Brampton Plate & Structural Steel Rolling Inc. (Intervener) (*Granted*)

**0298-93-R:** Kenneth Giffen (Applicant) v. London and District Service Workers Union, Local 220 (Respondent) v. Strathroy Nursing Homes Ltd. (Intervener) (*Granted*)

**0354-93-R:** Alex Innocenti (Applicant) v. International Longshoremen's Association (Respondent) v. QUNO Corp. (Intervener) (*Granted*)

**0441-93-R:** Tammy McArthur (Applicant) v. Hotel Employees Restaurant Employees Union Local 75, of the Hotel Employees Restaurant Employees International Union (Respondent) v. Louisiana Purchase Restaurant Ltd. and 482241 Ontario Ltd. (Intervener) (*Granted*)

## REFERRAL FROM MINISTER

**2047-92-M:** West York Construction 1984 Limited (Applicant) v. Toronto - Central Ontario Building and Construction Trades Council (Respondent) (*Dismissed*)

**3429-92-M:** Teamsters Local Union, No. 879 (Applicant) v. Crane Canada Inc. Crane Supply Division (Respondent) (*Granted*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**0605-93-U:** Maaten Construction Company Ltd. (Applicant) v. Ironworkers Local Union No. 700, International Association of Bridge, Structural and Ornamental Ironworkers and Ron Clock (Respondents) (*Withdrawn*)

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

**0379-93-U:** E. G. M. Cape & Co. Ltd. (Applicant) v. Toronto-Central Ontario Building & Construction Trades Council, Labourers', Local 183 (Respondents) (*Withdrawn*)

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1638-90-U:** Canadian Paperworkers Union (Applicant) v. Boise Cascade Canada Ltd. (Respondent) (*Withdrawn*)

**2552-90-U:** Nazzareno Del Duca and Mario Grillo (Applicant) v. International Brotherhood of Electrical Workers, I.B.E.W., Local 353 (Respondents) (*Withdrawn*)

**0607-91-U:** Graphic Communications International Union, Local 500M (Applicant) v. Reliable Bookbinders Limited (Respondent) (*Withdrawn*)

**1197-91-U:** Reliable Bookbinders Limited (Applicant) v. Graphic Communications International Union, Local 500M (Respondent) (*Withdrawn*)

**2471-91-U:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Applicant) v. Ellis-Don Limited (Respondent) (*Granted*)

**3975-91-U:** Amarjit Thind (Applicant) v. Bakery, Confectionery & Tobacco Workers International Union Affiliated with AFL-CIO & CLC Local 264 (Respondent) (*Withdrawn*)

**0122-92-U:** Canadian Union of Public Employees and its Local 1343 (Applicant) v. Deloitte & Touche (Respondent) (*Terminated*)

**0250-92-U:** Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its Local 1000 (Applicant) v.

Regis Corporation and Seligman and Latz of Polo Park Limited and other corporate entities listed on Schedule “A” to the applications (Respondents) (*Withdrawn*)

**0617-92-U:** Canadian Union of Public Employees and its Local 2198 (Applicant) v. Leslie Irvine and Arnprior & District Memorial Hospital (Respondent) (*Withdrawn*)

**2034-92-U:** The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada) (Applicant) v. Windsor Match Plate & Tool Limited (Respondent) (*Withdrawn*)

**2444-92-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Westin Harbour Castle (Respondent) (*Terminated*)

**2521-92-U:** International Brotherhood of Electrical Workers (Applicant) v. ADT Canada Inc. (Respondent) (*Withdrawn*)

**2563-92-U:** Graphic Communications International Union Local 500M (Applicant) v. Superior Engravers Limited, R.G. Samson Holdings Inc. (Respondents) (*Withdrawn*)

**2753-92-U:** United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L.-C.I.O. (Applicant) v. Lulu’s Roadhouse (Respondent) (*Withdrawn*)

**2822-92-U:** National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-CANADA) (Applicant) v. Hyundai Auto Canada Inc. (Respondent) (*Granted*)

**2823-92-U:** Kenneth Edward Homer (Applicant) v. International Brotherhood of Electrical Workers and its Local 636, St. Catharines Hydro-Electric Commission (Respondents) (*Dismissed*)

**2903-92-U:** Independent Plumbing and Heating Contractors Association (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Bridgewood Plumbing Ltd., Cosolo Plumbing & Heating Ltd. and Nortown Plumbing Limited (Respondents) (*Withdrawn*)

**3060-92-U:** Lulu’s Roadhouse (Applicant) v. United Food and Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Respondent) (*Withdrawn*)

**3062-92-U:** Sheet Metal Production Employees - E.S. Fox Niagara Falls, Ontario (Applicant) v. Sheet Metal Workers International Association Local 537 (Respondent)

**3064-92-U:** Christian Labour Association of Canada (Applicant) v. Uni-Care Retirement Centres Incorporated o/a Amber Lea Place (Respondent) (*Withdrawn*)

**3197-92-U:** Nicole Coscarella (Applicant) v. Office and Professional Employees International Union Local 343 (Respondent) v. Auto Workers Credit Union (Intervener) (*Dismissed*)

**3371-92-U:** Mark Costie (Applicant) v. CUPE Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

**3550-92-U:** Ontario Nurses’ Association (Applicant) v. Belleville General Hospital (Home Care) (Respondent) (*Withdrawn*)

**3592-92-U:** Feliz Serrano (Applicant) v. Hotel Employees Restaurant Employees, Union Local 75 (Respondent) (*Withdrawn*)

**3629-92-U:** United Food and Commercial Workers Union, Local 1000 (Applicant) v. 564171 Ontario Ltd., conducting business as Dieter and Darcy’s No Frills, and Loblaw Companies Ltd. (Respondent) (*Withdrawn*)

**3805-92-U:** Michael B. O'Brien (Applicant) v. United Textile Workers of America, Local 512 (Respondent) v. Johnson & Johnson Medical Products (Intervener) (*Withdrawn*)

**3830-92-U:** Ontario Nurses' Association (Applicant) v. Oakville Lifecare Centre (Respondent) (*Withdrawn*)

**0001-93-U:** United Food and Commercial Workers Union, Local 175 (Applicant) v. F. H. Strasler Holdings Inc. c.o.b. as Brown Bros. Funeral Homes (Respondent) (*Withdrawn*)

**0011-93-U:** Melissa Steidman (Applicant) v. Phil Thompson, Organizer, Canadian Security Union (Respondent) (*Withdrawn*)

**0015-93-U:** Graphic Communications Union Local 41M (Applicant) v. The Ottawa Citizen a division of Southam Inc. (Respondent) (*Withdrawn*)

**0035-93-U:** Brian Edward Quin (Applicant) v. Metropolitan Toronto Civic Employees Union Local 43 and City of Toronto Parks & Recreation (Respondents) (*Withdrawn*)

**0051-93-U:** Philip White (Applicant) v. Union Local 1986 (Respondent) v. A.G. Simpson Company Limited (Intervener) (*Withdrawn*)

**0098-93-U:** James Bruce Lyttle (Applicant) v. Metropol Security a Division of Barnes Security Services Ltd. (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

**0109-93-U:** Retail, Wholesale and Department Store Union AFL:CIO:CLC (Applicant) v. 895657 Ontario Inc. c.o.b. as Loeb Club Plus Woodstock (Respondent) (*Withdrawn*)

**0134-93-U:** United Food and Commercial Workers International Union, Affiliated with the C.F.L. - C.I.O. - C.L.C. and O.F.L. on behalf of its Local 114P (Applicant) v. Elbee Meat Packers Limited (Respondent) (*Withdrawn*)

**0154-93-U:** Beverley Trounce, Local 598, OPSEU (Applicants) v. Irene Gohm Ontario Teachers' Pension Plan Board (Respondent) (*Withdrawn*)

**0170-93-U:** United Food & Commercial Workers Union, Local 175 (Applicant) v. Atikokan Tom Boy Limited (Respondent) (*Withdrawn*)

**0172-93-U:** The London and District Service Workers' Union, Local 220 (Applicant) v. Cedarwood Village (Respondent) (*Withdrawn*)

**0173-93-U:** The London and District Service Workers' Union, Local 220 (Applicant) v. Maplewood Nursing Home (Respondent) (*Withdrawn*)

**0184-93-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Hyundai Canada Inc. (Respondent) (*Withdrawn*)

**0188-93-U:** Energy and Chemical Workers Union, Local 63 (Applicant) v. Crain-Drummond, (Drummond Business Forms (1984) Ltd.) (Respondent) (*Withdrawn*)

**0200-93-U:** Horace Colthirst (Applicant) v. Purolator Courier Limited and Teamsters, Local 938 (Respondents) (*Withdrawn*)

**0233-93-U:** Ndem Belende (Applicant) v. Fédération des enseignants université d'Ottawa, Université d'Ottawa (Respondents) (*Dismissed*)

**0239-93-U:** International Union of Operating Engineers, Local 793 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Withdrawn*)

**0246-93-U:** Office and Professional Employees International Union (Applicant) v. Greenpeace Canada (Hamilton Branch) (Respondent) (*Withdrawn*)

**0269-93-U:** Retail, Wholesale and Department Store Union (Applicant) v. Vitto Brand Foods Limited (Respondent) (*Withdrawn*)

**0283-93-U:** Service Employees International Union, Local 183 (Applicant) v. First Tran Bus Services (a division of Transcor Inc.) (Respondent) (*Withdrawn*)

**0296-93-U:** Dave Schroeder (Applicant) v. Ottawa Typographical Union (Respondent) (*Withdrawn*)

**0312-93-U:** Service Employees Union, Local 210 (Applicant) v. Pelee Days Inn (Respondent) (*Withdrawn*)

**0332-93-U:** Sylvia Mascarenhas (Applicant) v. OPEIU Local 343 (Respondent) (*Withdrawn*)

**0338-93-U:** United Steelworkers of America (Applicant) v. Shrader Canada Limited (Respondent) (*Withdrawn*)

**0377-93-U:** Bellai Brothers Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

**0378-93-U:** Michael Thomas Aitken (Applicant) v. United Food and Commercial Workers International Union (Respondent) (*Dismissed*)

**0383-93-U:** Betty Vamplew (Applicant) v. Ron Martin (Respondent) (*Dismissed*)

**0411-93-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. 683638 Ontario Ltd. (Respondent) (*Withdrawn*)

**0435-93-U:** R. Herbert (Applicant) v. G.M.A.C. (Respondent) (*Dismissed*)

**0541-93-U:** Rudy Bielecki (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board and Hamilton-Wentworth Roman Catholic Caretakers and Maintenance Employees' Association (Respondents) (*Dismissed*)

**0553-93-U:** Hardial Smara (Applicant) v. Hotel Employees Restaurant Employees Union local 75, Caterair Chateau Canada Limited (Respondents) (*Dismissed*)

**0578-93-U:** Service Employees Union Local 268, affiliated with the S.E.I.U. A.F. of L., C.I.O and C.L.C. (Applicant) v. The Corporation of the Town of Marathon, Jim Spencer and Doug Brown (Respondents) (*Withdrawn*)

**0580-93-U:** Rosa Nelson (Applicant) v. Pacific Building Maintenance Ltd. (Respondent) (*Dismissed*)

**0664-93-U:** United Food and Commercial Workers Union, Local 175/633 (Applicant) v. Loeb Club Plus Westminister (Respondent) (*Withdrawn*)

## **APPLICATION FOR INTERIM ORDER**

**0357-93-M:** United Steelworkers of America (Applicant) v. Shrader Canada Limited (Respondent) (*Withdrawn*)

**0556-93-M:** Shariar Namvar and Malik Awada (Applicant) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC and Blue Line Taxi Company Ltd. (Respondents) (*Dismissed*)

**0579-93-M:** Service Employees Union Local 268, affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C.

(Applicant) v. The Corporation of the Town of Marathon, Jim Spencer and Doug Brown (Respondents) (*Withdrawn*)

**0589-93-M:** International Union of Operating Engineers, Local 793 (Applicant) v. Reclamation Management Canada Ltd. (Respondent) (*Withdrawn*)

**0667-93-M:** United Food and Commercial Workers Union, Local 175/633 (Applicant) v. Loeb Club Plus - Westminster (Respondent) (*Withdrawn*)

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**3665-91-M:** Libor Drabek (Applicant) v. The Society (Responding Trade Union) v. Ontario Hydro (Responding Employer) (*Withdrawn*)

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**0063-93-M:** Northern Telecom Canada Limited (Employer) v. Communications, Energy and Paperworkers Union of Canada (Trade Union) (*Granted*)

**0297-93-M:** Rainone Construction Limited (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union) (*Granted*)

## JURISDICTIONAL DISPUTES

**1286-92-JD:** The Regional Municipality of Sudbury Pioneer Manor - Home for the Aged (Applicant) v. Ontario Nurses' Association, Canadian Union of Public Employees, Local 148 (Respondents) (*Granted*)

**1981-92-JD:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and Marble Tile and Terrazzo Union, Local 31 (Applicants) v. Labourers' International Union of North America Local 183; Ellis Don Limited; Bruce S. Evans Limited; Marathon Realty Company Limited (Respondents) (*Withdrawn*)

**2981-92-JD:** Labourers International Union of North America, Ontario Provincial District Council, Labourers International Union of North America, Local 1036 (Applicants) v. Nicholls-Radtke & Associates Ltd., Soo Coring & Sawing Corp., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508 (Respondents) (*Dismissed*)

**3427-92-JD:** International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Canadian Union of Public Employees, Local 1000 (Respondent) (*Granted*)

**0161-93-JD:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Labourers' International Union of North America, Local 183, Ellis Don Construction Limited and Terrazzo, Mosaic & Tile Company Limited (Respondents) (*Terminated*)

**0286-93-JD:** Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 537 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro, Millwrights & Machine Erectors Local 1007 by United Brotherhood of Carpenters and Joiners of America (Respondents) (*Withdrawn*)

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**0454-92-M:** CUPE Local 3519 (Applicant) v. Le Conseil des écoles francaises de la communauté urbaine de Toronto (Respondent) (*Granted*)

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**1132-92-OH:** James Gordon Duncan, Lloyd Kelvin Danford and Stanley Joseph Misiak (Applicants) v. McMaster University, R.J. Carter, and Justin Kazakevicius (Respondents) (*Withdrawn*)

**2453-92-OH:** Carlos Constance and C.A.W. Local 303 (Applicant) v. General Motors of Canada Ltd., Scar Van Plant (Respondent) (*Withdrawn*)

**3807-92-OH:** Paul Cyopick (Applicant) v. The Toronto Hospital (Respondent) (*Withdrawn*)

**0005-93-OH:** Richard Foster (Applicant) v. Canadian Marconi Co. (Respondent) (*Withdrawn*)

**0080-93-OH:** Guy Rivault (Applicant) v. A. C. & I. Services Ltd. (Respondent) (*Withdrawn*)

**0396-93-OH:** Mary Anne Green (Applicant) v. General Motors of Canada (Respondent) (*Withdrawn*)

**0397-93-OH:** Mary Anne Green (Applicant) v. General Motors of Canada (Respondent) (*Withdrawn*)

**0398-93-OH:** Mary Anne Green (Applicant) v. Gord Bulmer (Respondent) (*Withdrawn*)

**0399-93-OH:** Mary Anne Green (Applicant) v. Gord Bulmer (Respondent) (*Withdrawn*)

**0400-93-OH:** Mary Anne Green (Applicant) v. Randy Giroux (Respondent) (*Withdrawn*)

**0401-93-OH:** Mary Anne Green (Applicant) v. William (Bill) Frances (Respondent) (*Withdrawn*)

**0402-93-OH:** Mary Anne Green (Applicant) v. George Peapples (Respondent) (*Withdrawn*)

**0403-93-OH:** Mary Anne Green (Applicant) v. George Peapples (Respondent) (*Withdrawn*)

## COLLEGES COLLECTIVE BARGAINING ACT

**1635-92-U:** Ontario Public Service Employees Union Local 238 (Applicant) v. Conestoga College of Applied Arts and Technology (Respondent) (*Withdrawn*)

## CONSTRUCTION INDUSTRY GRIEVANCES

**2306-91-G:** Sheet Metal Workers International Association, Local 537 (Applicant) v. Electrical Power Systems Construction Association and Bechtel Canada Inc. (Respondents) (*Dismissed*)

**2809-91-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Withdrawn*)

**3182-91-G:** International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Elevator Co. (Respondent) (*Withdrawn*)

**3727-91-G:** International Brotherhood of Electrical Workers Local 353 (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

**0182-92-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E.S. Fox Limited (Respondent) (*Granted*)

**0865-92-G:** United Brotherhood of Carpenters and Joiners of America Local 249, United Brotherhood of Carpenters and Joiners of America Local 785 (Applicants) v. Rosmar Drywall & Acoustics Ltd., Canaan Construction Inc. (Respondents) (*Dismissed*)

**1642-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Suss Woodcraft Ltd. (Respondent) (*Granted*)

**1656-92-G:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Rosmar Drywall & Acoustics Ltd. and Canaan Construction Inc. (Respondents) (*Dismissed*)

**1672-92-G:** The International Union of Bricklayers & Allied Craftsmen, Local #1 (Applicant) v. Shadeland Masonry (Respondent) (*Granted*)

**1979-92-G:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen on its own behalf and on behalf of International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and Marble Tile and Terrazzo Union Local 31 (Applicants) v. Ellis Don Limited, Marathon Realty Company Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

**2268-92-G:** United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Gaspo Construction Ltd. (Respondent) (*Granted*)

**2308-92-G; 2309-92-G:** Sheet Metal Workers' International Association, Local 285 (Applicant) v. West York Construction 1984 Ltd. (Respondent); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Applicant) v. West York Construction 1984 Ltd. (Respondent) (*Granted*)

**2332-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. E.B. Woodcrafts Construction Inc. (Respondent) (*Granted*)

**2857-92-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Keith Holdsworth Consulting Ltd. (Respondent) (*Granted*)

**3109-92-G:** Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Farry Excavating & Grading Limited (Respondent) (*Withdrawn*)

**3160-92-G:** International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. O. J. Masonry Ltd. (Respondent) (*Granted*)

**3184-92-G:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Prestige Acoustics Limited and Paradise Acoustics & Drywall Limited (Respondents) (*Withdrawn*)

**3381-92-G:** Labourers' International Union of North America, Local 527 (Applicant) v. R.J. Nicol Construction (1975) Limited (Respondent) (*Withdrawn*)

**3385-92-G:** The Ontario Allied Construction Trades Council and Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 (Applicants) v. Electrical Power Systems Construction Association, (E.P.S.C.A.) (Respondent) (*Withdrawn*)

**3430-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wickstead-Manor Millwork Ltd. (Respondent); Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. Wiedeman Contracting Limited (Respondent) (*Withdrawn*)

**3521-92-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. John Hayman & Sons Company Limited, Ontario and King Ltd. (Respondents) (*Withdrawn*)

**3524-92-G; 3525-92-G:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. ESA Acoustics &

Drywall Ltd. (Respondent); Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Kota Construction Limited (Respondent) (*Withdrawn*)

**3571-92-G:** International Union of Elevator Constructors Local 90 (Applicant) v. Dover Corporation (Canada) Limited (Respondent) (*Withdrawn*)

**3595-92-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Sanvilla General Construction Ltd. (Respondent) (*Granted*)

**3596-92-G:** Labourers' International Union of North America, Local 183 (Applicant) v. D & R Ventura Construction Limited (Respondent) (*Granted*)

**3621-92-G:** United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Downsview Drywall (Respondent) (*Dismissed*)

**3716-92-G:** United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ross D. Neill Limited (Respondent) (*Withdrawn*)

**3736-92-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Northland Bitulithic Limited (Respondent) (*Withdrawn*)

**3835-92-G; 3836-92-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 860200 Ontario Ltd. c.o.b. B E S Re-Bar (Respondent) (*Granted*)

**0101-93-G:** International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

**0146-93-G:** The Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. N.K.P. Painting Contractors (1981) Limited, Galatia Construction Ltd. (Respondents) (*Granted*)

**0157-93-G:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Canron Inc. (Respondent) (*Granted*)

**0166-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

**0181-93-G:** Labourers' International Union of North America, Local 837 (Applicant) v. Cormar Contracting Ltd. (Respondent) (*Granted*)

**0194-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Lindsay Brothers Construction Ltd. (Respondent) (*Granted*)

**0221-93-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Cosolo Plumbing and Heating Limited (Respondent) (*Granted*)

**0222-93-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Cosolo Plumbing and Heating Limited and The Independent Plumbing and Heating Contractors' Association (Respondents) (*Granted*)

**0234-93-G:** Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Art Magic Carpentry Ltd. (Respondent) (*Granted*)

**0238-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Bellai Brothers Ltd. (Respondent) (*Withdrawn*)

**0244-93-G:** International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Limen Masonry Limited (Respondent) (*Withdrawn*)

**0248-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Capelas Homes Ltd. and Eagle Framers & Carpenters Ltd. and Eagle Bricklayers Ltd. (Respondents) (*Granted*)

**0257-93-G; 0258-93-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Highland York Flooring Company Limited (Respondent) (*Granted*)

**0259-93-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Light-Mar Electrical Contractors Limited (Respondent) (*Withdrawn*)

**0289-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Smith Bros. Excavating Inc. (Respondent) (*Granted*)

**0290-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Lasalle Backhoe Service Division of Winkup Construction Ltd. (Respondent) (*Granted*)

**0292-93-G:** Labourers' International Union of North America, Local 597 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Granted*)

**0301-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. D.S. Construction Co. Ltd. (Respondent) (*Granted*)

**0305-93-G:** Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Florida Ceilings Systems Ltd. (Respondent) (*Withdrawn*)

**0308-93-G:** Labourers' International Union of North America, Local 527 (Applicant) v. E & M Precast Ltd. (Respondent) (*Withdrawn*)

**0321-93-G:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Besa Interiors Ltd. (Respondent) (*Granted*)

**0331-93-G:** Sheet Metal Workers' International Association, Local 269 (Applicant) v. #951103 Ontario Ltd., c.o.b. as Brunet Heating and Air Conditioning and N.H. Reid Commercial, R.J. Brunet, c.o.b. as R.J. Brunet Sheet Metal (Respondents) (*Granted*)

**0349-93-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Vibron Limited (Respondent) (*Withdrawn*)

**0355-93-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Roxson Contractors 1991 Limited (Respondent) (*Withdrawn*)

**0370-93-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Inter Wide Sheet Metal Ltd./Inter Wide Mechanical & Contracting Ltd. (Respondent) (*Withdrawn*)

**0376-93-G:** Bellai Brothers Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

**0386-93-G:** Labourers' International Union of North America, Local 491 (Applicant) v. Acme Building and Construction Ltd. (Respondent) (*Granted*)

**0389-93-G:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Peacock Interior Finishes Limited, Peacock Fasteners & Building Specialties Inc., 456202 Ontario Inc. (Respondents) (*Granted*)

**0395-93-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, Local Union 463 (Applicant) v. Dynamic Power Excavating Ltd. (Respondent) (*Granted*)

**0406-93-G:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. 452918 Ontario Limited c.o.b. as Agincourt Drywall and 740783 Ontario Inc. c.o.b. as Whitby Drywall (Respondents) (*Withdrawn*)

**0421-93-G:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen - Local #4 Ontario, St. Catharines (Applicant) v. TN Masonry Limited (Respondent) (*Withdrawn*)

**0426-93-G:** International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 721 (Applicant) v. B.E.S. Rebar (Respondent) (*Withdrawn*)

**0445-93-G:** International Brotherhood of Electrical Workers, Local Union 1788 and IBEW Electrical Power Systems Construction Council of Ontario (Applicant) v. Ontario Hydro and The Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

**0453-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Mid-View Construction & Drain Limited (Respondent) (*Granted*)

**0454-93-G:** Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Valberg Construction (Respondent) (*Withdrawn*)

**0455-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Targa Limited (Respondent) (*Granted*)

**0456-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Bloomington Landscaping and Bloomington Green Houses & Landscaping (Respondent) (*Granted*)

**0457-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Lumar Construction Ltd. (Respondent) (*Granted*)

**0471-93-G; 0476-93-G; 0479-93-G; 0482-93-G; 0483-93-G; 0484-93-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Vale Electric Inc. (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Powerman Electric Ltd. (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Ibro Electric (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Calorific Construction Limited (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Delburn Electric Limited (Respondent) (*Withdrawn*)

**0478-93-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Northview Electrical Contractors A Division of 697235 Ontario Ltd. (Respondent) (*Granted*)

**0480-93-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lad Electric Limited (Respondent) (*Withdrawn*)

**0495-93-G:** United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. D.F.N. Drywall (Respondent) (*Withdrawn*)

**0522-93-G:** Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Honeywell Limited (Respondent) (*Withdrawn*)

**0657-93-G:** Marble Tile and Terrazzo Local Union No. 31 (Applicant) v. Moscone Tile Ltd. (Respondent) (*Withdrawn*)

**0661-93-G:** Labourers' International Union of North America Local 837 (Applicant) v. D. S. Construction Co. (Respondent) (*Granted*)

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**1176-92-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nickel City Contracting Limited - General Contractors (Respondent) (*Dismissed*)

**1851-92-U:** United Food and Commercial Workers International Union, Local 1990 (Applicant) v. Primo Foods Limited (Respondent) (*Dismissed*)

**3238-92-JD:** Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 473 (Applicants) v. Ontario Hydro, Electrical Power Systems Construction Association, Labourers' International Union of North America, Local 1059 (Respondents) (*Dismissed*)



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